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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,

v.

JESUS MORALES, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a loitering ordinance authorizing the arrest of persons who have disobeyed a police order to move on, given when a police officer has reasonable cause to believe that a group of loiterers contains a member of a criminal street gang, is impermissibly vague in violation of due process guarantees.

2. Whether, despite legislative findings about the deleterious effects of loitering by criminal street gangs, an ordinance that requires a group of loiterers containing criminal street gang members to obey a police order to move on violates substantive due process guarantees.

PARTIES TO THE PROCEEDING

The petitioner is the City of Chicago. The respondents are persons arrested under Chicago's gang loitering ordinance: James Youkhana, Fernando O. Cota, Jose A. Merced, Roosevelt McMullan, Jr., Johnny R. Newsome, Anthony D. Cordero, Julio M. Barroso, Hermie J. Khamo, Lamont J. Jordan, Lisa Gonzales, Florentine Soto, Renee Goodwill, Tasha White, Sabrina Brown, Gregorio Guiterrez, Sandy Garvin, Raul Jimenez, Jr., Daniel Washington, Jose Renteria, Jesus Morales, Malcolm Ramsey, Neil Round, Christopher Lostroscio, Casey A. Mazeika, Karl T. Kelly, Jesse K. Paschke, Roy Delgado, Jr., Japheth Estrada, Jorge Lopez, Wladyslaw W. Jedrol, James J. Portway, Michael A. Horton, Paris Bryant, Wesley Saffold, Eric Jones, Roshindaj Bryant, Leroy Minley, Jr., Eric Warren, Charlie Monden, Joseph Dell, Tywan Durnell Riley, Eric Miller, Jerry Cunningham, Eric Dennis, Vernon Diggs, Deandre Fitzpatrick, Darryl Hall, Cornelius Holt, Jonathan Lewis, Seth Lewis, Steve Reynolds, Claude Ross, Dushone Scott, Michael Simmons, Chester Sparks, Clarence Taylor, Michael Taylor, Stacey Wilson, Gabriel Ruiz, Maximilano Orozco, Ricardo Florez, Anibal Hernandez, Pablo Estrada, Juan Cruz, Andres Feliciano, and Peter Quinones.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Chicago, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App., *infra*, at 1a-19a) is not yet reported, but will be reported at 177 Ill. 2d 440, 687 N.E.2d 53 (1997). The opinion of the Illinois Appellate Court in *City of Chicago v. James Youkhana* (App., *infra* at 20a-36a) is reported at 277 Ill. App. 3d 101, 660 N.E.2d 34 (1995). The opinions of the appellate court in *City of Chicago v. Jesus Morales* (App., *infra* at 37a-38a) and *City of Chicago v. Malcolm Ramsey* (App., *infra* at 39a-40a) are unreported. The opinion of the Circuit Court of Cook County in *City of Chicago v. James Youkhana* (App., *infra* at 41a-59a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.[1]

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. The Chicago gang loitering ordinance is set out in the appendix to this petition. App., *infra* at 60a-63a.

STATEMENT

On June 17, 1992, the Chicago City Council adopted an ordinance authorizing police officers to order any group of individuais loitering in a public place to disperse if the officer reasonably believes that the group contains a member of a criminal street gang. App., *infra* at 61a. Failure to comply with the order is punishable by up to 6 months imprisonment, a $500 fine, or up to 120 hours of community service. App., *infra* at 63a.

[1] The opinion of the Illinois Supreme Court invalidated the Chicago gang loitering ordinance under the Due Process Clauses of both the federal and state Constitutions. The text of these provisions is virtually identical (compare U.S. Const. amend. XIV, § 1 with Ill. Const. art. I, § 2), and the court relied on federal and state precedents interchangeably. Its opinion contains no plain statement that the judgment rests on an adequate and independent state ground. Accordingly, this Court has jurisdiction to review the judgment below. See, *e.g.*, *Pennsylvania v. Labron*, 116 S. Ct. 2485, 2487 (1996) (per curiam); *Arizona v. Evans*, 514 U.S. 1, 7-10 (1995); *New York v. Class*, 475 U.S. 106, 109-10 (1986); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983). In fact, in their brief below, respondents asked the Illinois Supreme Court to make an express statement that a judgment invalidating the ordinance rested on an independent state ground, even calling the holding of *Michigan v. Long* to the court's attention, but the court did not do so.

Enactment of the ordinance followed hearings before the Chicago City Council's Committee on Police and Fire exploring the problems that criminal street gangs present for the people of Chicago—in particular the problems created by public loitering by gang members.[2] At the hearings, witnesses described how criminal street gang members loiter as part of a strategy to recruit new members, organize as a group, claim territory, and antagonize rival gangs and ordinary citizens. Supp. R. I at 121, 125; Supp. R. II at 32. Further testimony explained the inadequacy of existing laws to address this problem. Residents may complain to police of illegal gang activity taking place on their own streets, but once the police arrive, gang members and their cohorts will not commit any overt criminal act; instead, they will appear to be simply loitering. Supp. R. I at 50-51, 68, 79-80, 138-40; Supp. R. II at 33, 38. The testimony also showed that community residents are often afraid to file formal complaints, serve as witnesses, or take other steps necessary to prosecute criminal activity because of concerns for their own safety, or the safety of their family members or property. Supp. R. I at 50, 52, 54, 69, 108-09, 135; Supp. R. II at 22-25, 37, 40.

Perhaps most important, the testimony before the City Council disclosed that criminal street gangs are menacing and destructive regardless of whether their members are, at a particular moment, violating other laws. The intimidating presence of gangs itself has a palpable detrimental effect on a family's sense of well being, on the willingness of parents to allow their children outside, and on the willingness of Chicago residents to remain in the City. Supp. R. I at 53, 62, 93, 95, 110, 132, 138; Supp. R. II at 167.

[2] The transcripts of the hearings were lodged with the trial court in each case that was ultimately before the Illinois Supreme Court, and were then added as a supplemental record on appeal by stipulation. We cite to that supplemental record as "Supp. R."

Based on this testimony, the City Council, in the preamble to the ordinance, made the following findings:

> WHEREAS, In many neighborhoods throughout the City the burgeoning presence of street gang members in public has intimidated many law abiding citizens; and
>
> WHEREAS, one of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
>
> WHEREAS, members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know police are present, while maintaining control over identifiable areas by continued loitering; and
>
> WHEREAS, the City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity . . . .

App., *infra* at 60a-61a. The ordinance provides simply:

> Whenever a police officer observes a person he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

App., *infra* at 61a. "Loiter" is defined as "to remain in any one place with no apparent purpose." *Ibid.*[3]

During the hearings, representatives of the Departments of Law and Police informed the City Council that the Chicago Police Department would promulgate regulations for the ordinance that would guide its enforcement by

[3] The ordinance also contains a comprehensive and precise definition of "criminal street gang." App., *infra* at 61a-62a.

the police. See Supp. R. II at 185, 220. Police Department General Order 92-4 was later promulgated to govern when police officers are permitted to enforce the gang loitering ordinance. The Order permits the enforcement of the ordinance only in areas of the City designated by a district commander as areas where "the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." App., *infra* at 68a. The Order also provides specific criteria and objective standards for defining criminal street gangs, and that such gangs will be identified only on the basis of "specific, documented and reliable information" such as crime pattern information, surveillance results, witness interviews, admissions of street gang members, or information from informants of proven reliability. App., *infra* at 66a-67a. The Order also explains how membership in a criminal street gang may be established. The Order requires probable cause to believe that an individual is a member of a criminal street gang (App., *infra* at 71a-72a), and probable cause, in turn, requires "specific, documented, reliable information" that is substantiated by the arresting officer's experience and knowledge of the alleged offenders, such as an individual's admission of membership, an individual's display of distinctive colors, tattoos, or markings not ordinarily worn by persons other than criminal street gang members, the use of distinctive signs or symbols, or statements by a witness of proven reliability or whose statements can be independently corroborated. App., *infra* at 67a-68a.

After the ordinance became effective, numerous prosecutions of individuals for violating its proscriptions ensued, and various trial judges issued conflicting rulings on the constitutionality of the ordinance. In *City of Chicago v. Youkhana*, which became the first case to reach the Illinois Appellate Court, the defendants moved to dismiss the criminal cases against them on the ground that the ordinance was unconstitutional on its face. The circuit court

granted that motion in a written opinion. App., *infra* at 41a-59a.

The City took a timely appeal, and on December 18, 1995, the appellate court affirmed. The court made four separate holdings of facial unconstitutionality on federal grounds: the ordinance infringes constitutionally protected rights of speech and assembly because it "reaches conduct that the government has no business prohibiting," App., *infra* at 26a; it is unconstitutionally vague because it "fail[s] to establish . . . guidelines" for its enforcement, App., *infra* at 33a; it "unconstitutionally criminalizes a person's status" because it is directed at loitering by gang members; App., *infra* at 33a; and it "jeopardizes the rights guaranteed under the fourth amendment" because it "seems to us to be a transparent attempt to avoid the probable cause requirement," App., *infra* at 35a. Following that decision, on December 29, 1995, the appellate court consolidated all appeals the City had taken in other cases in which a trial court had declared the ordinance to be unconstitutional, and affirmed on the strength of *Youkhana*. See *City of Chicago v. Ramsey* (App., *infra* at 39a-40a). Also on that date, the appellate court consolidated all appeals taken by defendants from judgments of conviction under the ordinance in which constitutional attacks on the ordinance had been rejected, and reversed the judgments on the strength of the decision in *Youkhana*. See *City of Chicago v. Morales* (App., *infra* at 37a-38a).

The City filed petitions for leave to appeal to the Illinois Supreme Court from the appellate court's judgments in the three appeals. In addition, the City moved the appellate court to issue a certificate of importance in *Youkhana*.[4] On February 27, 1996, the appellate court

[4] The Illinois Supreme Court has mandatory jurisdiction in cases in which the appellate court has issued a certificate of importance. See Ill. Const. art. IV, § 4(c); Ill. Sup. Ct. R. 316. Its exercise of jurisdiction in cases on petition for leave to appeal is discretionary. See Ill. Sup. Ct. R. 315.

issued the certificate of importance. On April 3, 1996, the Illinois Supreme Court granted the petitions for leave to appeal in *Morales* and *Ramsey*, and consolidated them with the *Youkhana* appeal.

On October 17, 1997, the Illinois Supreme Court affirmed the judgments of the appellate court on two grounds. First, the court concluded that the gang loitering ordinance was impermissibly vague. The ordinance fails to give persons fair notice of what conduct is prohibited because it " 'makes criminal activities which by modern standards are normally innocent' " (App., *infra* at 9a (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972))), and employs language—the term "loiter"—that "is inadequate to inform a citizen of its criminal implications" (App., *infra* at 9a). As for the ordinance's requirement that a police officer reasonably believe that a group of loiterers includes a member of a criminal street gang, the court concluded that this "depends solely on the police officer's subjective evaluation of the facts of the situation in light of his own experience." App., *infra* at 12a. The prerequisite that loiterers also disobey an order to move on before they can be arrested failed to save the ordinance because "[m]erely adding the element of refusing to obey an order by police to disperse does not elevate the gang loitering ordinance to such a level that it provides adequate notice of proscribed conduct." App., *infra* at 13a. The court also concluded that the ordinance permitted arbitrary and discriminatory enforcement by conferring "unfettered discretion in the police to determine whether a suspect's conduct has violated the ordinance." App., *infra* at 15a.

Second, the court concluded that the gang loitering ordinance offends substantive due process. Again relying on *Papachristou*, the court reasoned that the freedom to loiter, while not expressly protected by the Constitution, constitutes a fundamental right as one of the "amenities of American life." App., *infra* at 17a. The court also

determined that a prohibition on loitering infringes the "right to travel," the "right of locomotion," the "right to freedom of movement," and "the general right to associate with others." App., *infra* at 18a. This deprivation of constitutionally protected liberty was "utterly unreasonable," since it deprived "[p]ersons suspected of being in criminal street gangs . . . of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime." *Ibid.*

REASONS FOR GRANTING THE PETITION

Criminal street gangs, as the Illinois Supreme Court recognized, "are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens." App., *infra* at 17a. Among the problems posed by gangs are those engendered when gangs can loiter with impunity on the public ways. The findings of the Chicago City Council, which the Illinois Supreme Court did not question, explain that loitering by criminal street gang members and their hangers-on poses at least two kinds of problems. First, although gang members blatantly engage in drug deals and other crimes on the public way in full view of neighborhood residents, they stand about pretending to be innocently loitering once the police arrive. Second, the mere presence of a large collection of brazen, lawless, and violent gang members and others on the public way intimidates residents, who become afraid even to leave their homes. Thus the gang loitering ordinance is designed to provide residents and communities with a greater measure of control over those who disrupt community stability, detract from property values, and intimidate their neighbors.[5]

[5] The gang loitering ordinance has generated considerable academic commentary. See Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 Calif. L. Rev. 379 (1995); Comment, *Curbing Gang-Related Violence in America: Do Gang Members Have a Constitutional Right to Loiter on Our Streets?*, 43 Case W. Res. L. Rev. 661 (1993); Note, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 Chi.-Kent L. Rev. 461 (1993).

Chicago's experience with the gang loitering ordinance reflects its import. In the period of time during which the ordinance was enforced before the appellate court's decisions in this case, we estimate that some 45,000 orders to disperse were issued under the ordinance and obeyed, and some 43,000 arrests were made of those who failed to move on after being ordered to do so. Removing a visibly lawless element whose very presence on the public ways was often viewed by rival gangs as an invitation to violence had a substantial effect on the level of gang-related violence in Chicago. In 1995, for example, the last year in which the ordinance was enforced, the level of gang-related homicide in Chicago dropped at a considerably steeper rate than the general homicide rate, while in 1996, without enforcement of the ordinance, the overall homicide rate continued to fall, but the level of gang-related homicide resumed its rise.[6] Perhaps it is just this simple: if fewer gang members are standing around in public where they constitute an inviting target for their rivals, fewer of them—and innocent people nearby—will be shot to death.

Loitering ordinances are therefore an important prophylactic alternative to the largely reactive approach of conventional criminal laws, which require the authorities to wait for a breach of the peace to occur, often with tragic consequences. Prosecutions for these other crimes also depend on proof from victims or witnesses willing to cooperate and able to remain alive until the time of trial. Because of just these problems, prophylactic measures, such as loitering laws, have been employed at all levels

[6] Homicide statistics maintained by the Chicago Police Department show that in 1995, the overall homicide rate in Chicago fell 9%, but the gang-related homicide rate fell 26%. In 1996, the overall homicide rate fell another 4%, but the gang-related homicide rate rose 11%.

throughout our Nation's history. But under the approacn taken in the decision below, it is decidedly unlikely that any loitering ordinance could survive constitutional attack. The Illinois Supreme Court has held that the concept of loitering is itself fatally vague, and cannot be cured even if an arresting officer must satisfy an objective test for identifying which groups of loiterers are subject to the ordinance—here a reasonable belief that the group loitering includes a member of a criminal street gang. Moreover, the court concluded that this ordinance provides insufficient notice to persons of what conduct is forbidden, even though the ordinance requires that loiterers receive actual notice in the form of an order to disperse before they are subject to arrest. And the court's conception of substantive due process as protecting anyone standing or walking on the public ways as long as such a person is not committing any other crime means that the basic prophylactic goal of loitering ordinances is constitutionally forbidden.

This approach is inconsistent with decisions in other jurisdictions, which have upheld loitering ordinances as long as police officers are required to employ an objective test in order to enforce them. Still other jurisdictions admittedly have reached results consistent with the holding below, in large part in reliance on broad language in this Court's decision in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Review of the decision below is warranted to resolve the differing approaches that various jurisdictions have taken to the constitutionality of loitering ordinances, and to confine the ambit of *Papachristou* so that it does not unduly constrain legitimate exercises of state and local police powers.

1. The decision below reflects a serious misapplication of vagueness doctrine. That "doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Kolender v. Lawson, 461 U.S. 352, 357 (1983). Thus vagueness doctrine has two prongs, focusing "on actual notice to citizens and arbitrary enforcement . . . ." *Id.* at 358. There is no constitutional infirmity on either prong here.

The gang loitering ordinance easily satisfies the first prong. No one who has been given a police order to move on could fail to understand what is required of him, and under our ordinance, no arrest can be made unless there is first a police order to move on and a refusal to comply with that order. On this point, this Court's holding in *Colten v. Kentucky*, 407 U.S. 104 (1972), is dispositive. Colten had attempted to engage a police officer in conversation while the officer was issuing a traffic ticket, and then disobeyed the officer's order to move on. See *id.* at 106-07. The Court upheld the Kentucky disorderly conduct statute against a vagueness attack, noting that anyone "should understand that he could be convicted . . . if he fails to obey an order to move on." *Id.* at 110. Accordingly, the statute was "sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Ibid.*

To be sure, the Illinois Supreme Court was correct that if police officers are afforded standardless discretion to order individuals to move on, the refusal to obey a police order does not cure vagueness. App., *infra* at 12a-14a. As the court below recognized, in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), this Court explained, albeit in dicta, that an ordinance granting the police discretion to order anyone standing on a street or sidewalk to move on would be impermissibly vague. The Court's reasoning there, however, was not premised on a lack of fair notice, but rather on the risk of arbitrary and discriminatory enforcement. See *id.* at 90-91 & n.5. When it comes to providing notice to potential offenders, an ordinance requiring disobedience of a police order before an arrest can be made is the antithesis of vague: people

are told precisely what they must do—move along—to avoid arrest.

On the second prong of vagueness doctrine—whether the ordinance permits arbitrary or discriminatory enforcement—the ordinance also passes muster. This aspect of vagueness jurisprudence requires that "laws must provide explicit standards for those who apply them." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Thus, enactments that are enforced based on the wholly subjective judgments of police officers are condemned. For example, in *Kolender*, the statute required a loiterer to provide "credible and reliable" identification to a police officer, and thereby conferred "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute . . . ." *Id.* at 358. See also *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance prohibiting "annoying" conduct is impermissibly vague because "no standard of conduct is specified at all"). Chicago's gang loitering ordinance, however, specifies objective standards for enforcement judgments.

First, whatever imprecision there may be in the term "loiter," that term plainly does not permit officers to issue any type of order to anyone who is moving along. Second, and more important, the ordinance contains an expressly objective test for the propriety of directing loiterers to move, permitting officers to order groups to disperse only if the officer "reasonably believes" that the group contains a member of a criminal street gang. App., *infra* at 61a.[7]

[7] General Order 92-4 construes the ordinance to require probable cause to believe that a member of a criminal street gang is loitering, and there are rigorous standards for determining membership in a criminal street gang. App., *infra* at 67a-68a, 71a-72a. Such administrative guidelines for enforcement are appropriately considered in evaluating claims of vagueness. See, *e.g.*, *Kolender v. Lawson*, 461 U.S. at 355; *Hoffman Estates*, 455 U.S. at 494 n.5. The Illinois Supreme Court questioned the efficacy of General Order 92-4, observing that respondent Morales was arrested because the officer determined he was a gang member because he was wearing black and blue clothing. App., *infra*, at 16a n.1. The court misunderstood the record on this point. Morales was not arrested merely because of the colors he was wearing, but also because the loiterers admitted they belonged to a criminal street gang. C. 3. The trial judge later convicted Morales, finding that he had admitted that he was a member of a criminal street gang, although he had himself denied belonging to the gang. Tr. 9/20/93 at 19, 22.

And, of course, all criminal statutes are enforced based on the arresting officer's belief that reasonable suspicion or probable cause exists. If reliance on the reasonable beliefs of an arresting officer is considered to grant the police "unfettered discretion" as the Illinois Supreme Court claimed (App., *infra* at 16a), the whole of the criminal law would be impermissibly vague.

This Court has made clear that vagueness doctrine permits laws that provide for their enforcement based on the objectively reasonable beliefs of arresting officers. In *Boos v. Barry*, 485 U.S. 312 (1988), for example, this Court considered a vagueness attack on an ordinance prohibiting congregations near foreign embassies that had been construed to apply only when the police reasonably believed that a threat to the security or peace of the embassy was present. See *id.* at 329-30. The Court concluded that the statute, as construed, did no more than permit police to act when "normal embassy activities have been or are about to be disrupted." *Id.* at 332. This test was expressed "in words of common understanding, and it accordingly withstands . . . vagueness challenge." *Ibid.* (citations omitted). And in *Kolender*, the Court acknowledged that a loitering ordinance would be valid if it authorized investigative stops when reasonable suspicion of criminal activity is present under the standard announced in *Terry v. Ohio*, 392 U.S. 1 (1968). See 461 U.S. at 360-61. That test, of course, is an objective one, even though the police retain considerable discretion when applying it. And certainly the concept of membership in

a criminal street gang is not so amorphous that it is impossible to have objectively based beliefs on that point—as General Order 92-4 explains, there are a variety of objective indicia of membership in a criminal street gang, such as an individual's admissions, his display of distinctive signs or symbols, or the existence of information from a reliable informant. Indeed in *City of Tacoma v. Luvene*, 118 Wash. 2d 826, 827 P.2d 1374 (1992), the court rejected a vagueness attack against a loitering ordinance that permitted enforcement based on gang membership, concluding that gang membership can be objectively ascertained. See *id.* at 848 n.12, 827 P.2d at 1386 n.12.[8]

The Illinois Supreme Court reached a different result, relying on language in *Papachristou* that suggests that laws are impermissibly vague when they "make[] criminal activities which by modern standards are normally innocent." App., *infra* at 9a (quoting *Papachristou*, 405 U.S. at 163). The ordinance invalidated in that case was so broad that it could reach virtually any person walking in Jacksonville, and for that reason lent itself to arbitrary and discriminatory enforcement (see 405 U.S. at 168-71), rather than confining its reach to those who have disobeyed a police order issued under an objective standard. But largely because of the uncertain reach of *Papachristou*, the lower courts are in disarray about the constitutionality of loitering ordinances that require arresting officers to apply objective tests to determine which loiterers are subject to arrest.

The Model Penal Code, for example, contains a loitering ordinance prohibiting loitering "in a place, at a time,

[8] Many jurisdictions have made gang membership an element of an offense or a basis for sentencing enhancement, and vagueness attacks on such enactments have been repeatedly rejected. See, *e.g.*, *People v. Gardeley*, 14 Cal. 4th 605, 623-24, 927 P.2d 713, 724-25, 59 Cal. Rptr. 356, 367-68 (1996), cert. denied, 118 S. Ct. 148 (1997); *Jackson v. State*, 634 N.E.2d 532, 535-36 (Ind. App. 1994); *Helton v. State*, 624 N.E.2d 499, 505-07 (Ind. App. 1993); *State v. Walker*, 506 N.W.2d 430, 431-32 (Iowa 1993).

or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." American Law Institute, *Model Penal Code* § 250.6 (1905). Courts have reached conflicting results when evaluating enactments based on this model. A number of courts believe that this type of ordinance adequately cabins enforcement discretion, since it requires police officers to have objectively reasonable beliefs about whether loiterers' presence warrants alarm.[9] Yet other courts have found laws modeled on the Model Penal Code to be impermissibly vague because of their potential to reach persons engaged in innocent conduct.[10] The same pattern emerges in cases considering prohibitions on loitering with intent to engage in a particular crime. Some courts have upheld such ordinances, reasoning that they require police officers to have objectively reasonable beliefs about the intent of loiterers.[11] But again, other

[9] See *State v. Ecker*, 311 So. 2d 104 (Fla.), cert. denied, 423 U.S. 1019 (1975); *Bell v. State*, 252 Ga. 267, 313 S.E.2d 678 (1984); *Salt Lake City v. Savage*, 541 P.2d 1035 (Utah 1975), cert. denied, 425 U.S. 915 (1976); *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 439 N.W.2d 562, cert. denied, 493 U.S. 858 (1989).

[10] See *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166, 1171-74 (2d Cir. 1974), aff'd on other grounds sub nom. *Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *State v. Bitt*, 118 Idaho 584, 798 P.2d 43 (1990); *City of Portland v. White*, 9 Or. App. 239, 495 P.2d 778 (1972); *City of Bellevue v. Miller*, 85 Wash. 2d 539, 536 P.2d 603 (1975).

[11] See *State ex rel. Williams v. City Court*, 21 Ariz. App. 489, 520 P.2d 1166 (1974) (loitering for the purpose of begging); *Lambert v. City of Atlanta*, 242 Ga. 645, 250 S.E.2d 456 (1978) (loitering for purposes of prostitution); *People v. Superior Court*, 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988) (loitering to engage in lewd behavior); *State v. Armstrong*, 282 Minn. 39, 162 N.W.2d 357 (1968) (loitering with intent to commit a crime); *People v. Smith*, 44 N.Y.2d 613, 378 N.E.2d 1032, 407 N.Y.S.2d 462 (1978) (loitering for the purpose of engaging in prostitution); *People v. Pagnotta*, 25 N.Y.2d 333, 253 N.E.2d 202, 305 N.Y.S.2d 484 (1969) (loitering for the purpose of using narcotics); *State*

courts have held that such ordinances are impermissibly vague because they believe that a police officer's view about a loiterer's intent is inherently unreliable, and thus likely to reach persons engaged in innocent activities.[12]

The same split of authority emerges when courts review other laws that can reach arguably innocuous or inoffensive conduct. For example, courts have disagreed on the validity of laws based on the Model Penal Code's anti-noise ordinance, prohibiting "unreasonable" noise "with purpose to cause public inconvenience, or alarm, or recklessly creating a risk thereof." *Model Penal Code* § 250.2 (1)(b). Some courts uphold such ordinances based on their objective character,[13] while others find that this standard may reach noise that is not actually offensive.[14] "Cruising" ordinances—forbidding driving past a certain location more than a specified number of times during a given period—have also encountered inconsistent judicial treatment for this same reason.[15] This pattern may be clearest in cases considering ordinances that forbid sleeping in public. Some courts uphold these ordinances,[16] but others find them vague since they may reach innocuous conduct.[17] And in this case as well, what the court found critical, relying on *Papachristou*, is that the gang loitering ordinance "fails to distinguish between innocent conduct and conduct calculated to cause harm and 'makes criminal activities which by modern standards are normally innocent.'" App., *infra* at 9a (quoting 406 U.S. at 163).

This injection into vagueness doctrine of the issue of what types of conduct should be deemed innocent and inoffensive is misplaced. Surely legislatures and not courts should decide whether a type of conduct has created a sufficiently serious threat to public order to justify a prophylactic prohibition. In our view, as long as people receive notice of what they must do through an order to move along that is itself based on an objective standard, they may not complain of vagueness. Yet, the court below—and a number of other courts—relied on *Papa-*

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ex rel. Juvenile Department v. D., 27 Or. App. 861, 557 P.2d 687 (1976) (loitering to engage in prostitution), appeal dismissed, 434 U.S. 914 (1977); *City of Tacoma v. Luvene*, 118 Wash. 2d 826, 827 P.2d 1374 (1992) (loitering to engage in drug-related activity); *City of Seattle v. Jones*, 79 Wash. 2d 626, 488 P.2d 750 (1971) (loitering with intent to engage in prostitution); *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 291 N.W.2d 452 (1980) (same).

[12] See *Northern Virginia Chapter, American Civil Liberties Union v. City of Alexandria*, 747 F. Supp. 324 (E.D. Va. 1990) (loitering to engage in drug transactions); *Johnson v. Carson*, 569 F. Supp. 974 (M.D. Fla. 1983) (loitering to engage in prostitution); *Brown v. Municipality of Anchorage*, 584 P.2d 35 (Alaska 1978) (same); *People v. Gibson*, 184 Colo. 444, 521 P.2d 774 (1974) (loitering to engage in deviate sexual intercourse); *E.L. v. State*, 619 So. 2d 252 (Fla. 1993) (loitering to engage in drug-related activity); *Wyche v. State*, 619 So. 2d 231 (Fla. 1993) (loitering to engage in prostitution); *City of South Bend v. Bowman*, 434 N.E.2d 104 (Ind. App. 1982) (loitering to engage in sexual activity); *City of Akron v. Rowland*, 67 Ohio St. 3d 374, 618 N.E.2d 138 (1993) (loitering to engage in drug-related activity); *Coleman v. City of Richmond*, 5 Va. App. 459, 364 S.E.2d 239 (1988) (loitering with intent to engage in prostitution).

[13] See *Price v. State*, 622 N.E.2d 954, 966-67 (Ind. 1993); *People v. Bakolas*, 59 N.Y.2d 51, 449 N.E.2d 738, 462 N.Y.S.2d 844 (1983) (per curiam); *Commonwealth v. Mastrangelo*, 489 Pa. 254, 414 A.2d 54, appeal dismissed, 449 U.S. 894 (1980).

[14] See *Langford v. City of Omaha*, 755 F. Supp. 1460, 1462-63 (D. Neb. 1989); *Marks v. City of Anchorage*, 500 P.2d 644, 652-53 (Alaska 1972).

[15] Compare *Lutz v. City of York*, 899 F.2d 255, 270-71 (3d Cir. 1990) (upholding ordinance) and *Brandmiller v. Arreola*, 199 Wis. 2d 528, 546-48, 544 N.W.2d 894, 901-02 (1996) (same) with *State v. Stallman*, 519 N.W.2d 903 (Minn. App. 1994) (invalidating ordinance).

[16] See *Seeley v. State*, 655 P.2d 803 (Ariz. App. 1982); *People v. Davenport*, 176 Cal. App. 3d Supp. 10, 222 Cal. Rptr. 736 (App. Dep't Super. Ct. 1985), cert. denied, 475 U.S. 1141 (1986).

[17] See *Horn v. City of Montgomery*, 619 So. 2d 949 (Ala. Crim. App. 1993); *City of Pompano Beach v. Capalbo*, 455 So. 2d 468 (Fla. Dist. Ct. App. 1984), cert. denied, 474 U.S. 824 (1985); *State v. Penley*, 276 So. 2d 180 (Fla. Dist. Ct. App. 1973).

christou to conclude that a law's potential to reach people whose hearts are pure is enough to make it vague.

This disagreement in the lower courts about the scope of vagueness doctrine is unlikely to resolve itself without guidance from this Court. In the 25 years since *Papachristou,* the lower courts have been unable to agree on whether laws that can reach arguably inoffensive conduct should be condemned for that reason. As one commentator recently observed in her valuable article, "[t]he overall pattern of decisions . . . is erratic, fractured, and confusing rather than resolutely arrayed against the constitutional validity of public order laws." Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing,* 97 Colum. L. Rev. 551, 628 (1997). This Court should now decide which reading of *Papachristou* is correct, or modify *Papachristou*'s holding if necessary, to prevent further confusion in the future.

2. The Illinois Supreme Court's substantive due process holding was even further off the mark. Under substantive due process principles, an enactment that infringes no fundamental liberty need only be rationally related to a legitimate governmental interest. See, *e.g., Washington v. Glucksberg,* 117 S. Ct. 2258, 2271-72 (1997); *Reno v. Flores,* 507 U.S. 292, 301-03 (1993). And contrary to the conclusion of the court below, our Constitution recognizes no fundamental right to loiter.

The Illinois Supreme Court discerned a "general right to associate with others" (App., *infra* at 18a), but this Court has rejected such a right. As the Court explained in *Roberts v. United States Jaycees,* 468 U.S. 609 (1984), the right to associate is protected only in two senses: when undertaken to engage in the "intimate human relationships" attendant to the "creation and sustenance of a family—marriage; childbirth; the raising and education of children; and the cohabitation with one's relatives" (*id.* at 617, 619), or when undertaken for the purpose of

engaging in activities otherwise protected by the First Amendment such as "speech, assembly, petition for the redress of grievances, and the exercise of religion" (*id.* at 618). Neither of these contexts is involved in this case.

As for intimate relationships, the ordinance applies only to those who hang about in public places doing nothing apparent, hardly the type of intimate personal activity to which the Court referred in *Roberts.* As for First Amendment associational rights, precisely because the ordinance defines "loiter" as "to remain in any one place with no apparent purpose" (App., *infra* at 61a), it will rarely if ever apply to those who have assembled for the purpose of protected activity, such as picketing or protests. After all, it is hardly a protest, for example, when a gathering has no "apparent purpose." Respondents have not even claimed that the ordinance has been applied to protests or other joint advocacy activities.

Indeed, any suggestion that the rights of free speech and assembly reaches merely standing on a public way, simply because one intends to talk to someone else, runs square into *City of Dallas v. Stanglin,* 490 U.S. 19 (1989), in which the Court firmly rejected the existence of a generalized right of "social association" rooted in the First Amendment. See *id.* at 25. While those challenging the dance-hall ordinance at issue in that case claimed that it infringed a fundamental First Amendment right to be with others, the Court disagreed: "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Ibid.* Similarly, in *Colten v. Kentucky,* the Court rejected with equal clarity Colten's claim that he had a First Amendment right to remain on a public sidewalk even after having been ordered

to move by a police officer, merely because he desired to engage the officer in debate. See 407 U.S. at 109.[18]

The Illinois Supreme Court's invocation of the "right to travel" and the "right of locomotion" (App., *infra* at 18a) is even more misplaced. Whatever protections the concept of substantive due process offers to these activities, surely loitering is the antithesis of travel. If gang members and their associates only keep on walking—exercising the very right to travel they claim is infringed by the ordinance—they will not be subject to arrest.

Aside from its incorrect reliance on associational and travel rights, the Illinois Supreme Court relied only on *Papachristou* for the conclusion that the right to loiter is a traditional "amenit[y] of American life." App., *infra* at 17a. In fact, history and tradition point the other way; as we explain below, there is a long legacy in our country of regulating loitering. And to the extent that language in *Papachristou* suggests that loitering laws are suspect because they have the potential to reach conduct that is innocuous in nature, it represents a brand of substantive due process that surely should be interred. Enactment of all prophylactic laws involves weighing the benefits of prophylaxis against the cost of prohibiting conduct that is sometimes innocent. The Constitution provides no basis for courts to invalidate such laws merely because they disagree with the legislative assessment of costs and benefits; such a jurisprudence harkens back to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905).

The California Supreme Court, in its recent decision in *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d 277, cert. denied, 117 S. Ct. 2513 (1997), took precisely the opposite view from the court

[18] Thus, although the court below stated that it need not reach respondents' argument that the ordinance infringes associational rights (App., *infra* at 19a), that argument suffers from the same defect as the associational rights on which the court relied to support its substantive due process holding.

below, finding that an injunction prohibiting gang members from associating together in public infringed no constitutionally protected interest. The court reasoned that gang members could assert at most the kind of generalized right of social association rejected in *Stanglin*, since there was no showing that their loitering involved either intimate and private activity or joint political or social advocacy. See *id.* at 1110-12, 929 P.2d at 608-09, 60 Cal. Rptr. at 289-90. Cf. *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996) (upholding loitering ordinance that prohibited sitting or lying in the sidewalk); *Lutz v. City of York*, 899 F.2d 255, 266-70 (3d Cir. 1990) (law restricting vehicular cruising upheld). That approach should have been taken in this case as well.

Here, the gang loitering ordinance infringes the "liberty" interest in using the public ways only to a limited extent—anyone can loiter alone, or even with others, including criminal street gang members, as long as they move along when directed to do so. Of course, despite the City Council's attempts to craft the narrowest ordinance that would still address the baneful consequences of gang loitering, we do not contend that the ordinance could never be applied to persons whose conduct may in fact be innocuous or inoffensive. But a potential for application to "innocent" conduct does not give rise to a substantive due process violation. Here, the City Council reasonably concluded that the need to remove the visibly lawless element of loiterers from the public ways—because their loitering itself destabilizes communities, lowers property values, and intimidates law-abiding residents—justified whatever burden is imposed on persons engaged in "innocent" activity who are directed to move along as a result of this ordinance. Because that judgment is rationally related to legitimate governmental objectives, it should not have been set at naught in the name of substantive due process.[19]

[19] The Illinois Supreme Court did not reach respondents' arguments that the ordinance is overbroad, creates a status offense, and

3. Loitering laws have a considerable pedigree. And, if not unduly restrained, an important future. English loitering and vagrancy laws date to the fourteenth century, and have been widely employed in this country since the American Revolution. See *Model Penal Code* § 250.6, comment 1. See also, *e.g.*, Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 Criminology 209 (1989); Robert Force, *Decriminalization of Breach of the Peace Statutes: A Nonpenal Approach to Order Maintenance*, 46 Tul. L. Rev. 367 (1972).

Interest in enforcement of public order laws has been renewed by the emergence of community-oriented policing and its theoretical underpinning—the "Broken Windows" thesis first advanced by Professors James Q. Wilson and George Kelling. They observed that in the wake of the professionalization of policing in the 1950s and 1960s, law enforcement had stressed strategies based on investigating those crimes thought to be most serious, thereby

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authorizes arrests without probable cause. What we have explained above largely answers these arguments as well. To be overbroad, a law must reach a substantial quantum of conduct protected by the First Amendment. *E.g.*, *New York v. Ferber*, 458 U.S. 747, 769-73 (1982). Because this ordinance prohibits only loitering, it will rarely if ever reach protests, picketing, or other protected conduct, which is conduct with an "apparent purpose." Thus, the ordinance is not substantially overbroad. The ordinance also does not create a status offense because it requires conduct—loitering plus disobedience of a police order—and laws requiring "some *actus reus*" are not considered status offenses. *Powell v. Texas*, 392 U.S. 514, 533 (1968). Nor does the ordinance authorize arrests without probable cause. The order to move is not itself a "seizure" subject to Fourth Amendment review because it does not restrain the person receiving the order. See *California v. Hodari D.*, 499 U.S. 621, 629 (1991). And since no arrest can occur until there is probable cause to believe that the police order has been disobeyed, this type of ordinance is consistent with the Fourth Amendment. See *City of Milwaukee v. Nelson*, 149 Wis. 2d at 454-62, 439 N.W.2d at 569-72 (as long as probable cause exists to believe defendant was loitering in violation of ordinance, loitering arrests comport with the Fourth Amendment).

overlooking the important function that public order maintenance served. See James Q. Wilson & George L. Kelling, *Broken Windows*, Atlantic Monthly, Mar. 1982, at 33-38. See also, *e.g.*, Egon Bittner, *Aspects of Police Work* 12-13, 133-62 (1990); George L. Kelling & Catherine M. Coles, *Fixing Broken Windows* 82-107 (1996); Charles R. Swanson, Leonard Territo & Robert W. Taylor, *Police Administration: Structures, Processes and Behavior* 3-29 (3d ed. 1993); Samuel Walker, *The Police in America* 12-39 (1992). The "Broken Windows" thesis is that crime is most effectively combatted when the police can address signs of visible disorder—including loitering—that destabilize communities and stimulate the commission of more serious crimes. See, *e.g.*, Kelling & Coles, *supra* at 16-36; Wesley G. Skogan, *Disorder and Decline*, 9-10, 51-57, 73-75 (1990); Jerome H. Skolnick & David H. Bayley, *Community Policing: Issues and Practices Around the World* 4-19 (Nat'l Ins. of Justice 1988); Wilson & Kelling, *supra* at 31-33. In light of these insights, commentators have repeatedly called for courts to provide greater leeway to state and local governments to address signs of chronic disorder on the streets. See, *e.g.*, Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public Zoning*, 105 Yale L.J. 1165, 1177-84, 1238-46 (1996); Livingston, *supra* at 650-72.

Thus, loitering laws are an important part of modern proactive and preventive policing strategies. As Professor Dan Kahan of the University of Chicago Law School has observed:

> The public presence of gangs, like other visible signs of disorder, emboldens law-breakers and frightens law-abiders.
>
> Even more disturbing, visible gang activity drives a wedge between neighborhoods and the police. When law-abiding citizens see gang members congregating on the streets, they infer that cooperating with law-enforcement officials is futile and dangerous.

> And their reluctance to report law breaking predictably leads to more of it.
>
> Giving the police the power to suppress open gang activity is thus an important tool for repairing community norms that sustain law-abiding behavior.

Dan N. Kahan, *Defending the Gang-Loitering Law*, Chicago Trib., Dec. 31, 1995, § 1 at 19.

The Illinois Supreme Court denigrated the necessity of loitering ordinances observing that "[many] of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts." App., *infra* at 19a. But surely it is no answer to law-abiding residents, who no longer feel safe when they go outdoors, that someone may eventually be prosecuted on a serious felony charge—if proof beyond a reasonable doubt can be assembled. And under the decision below, it is difficult to imagine how any loitering ordinance could be upheld. The Illinois Supreme Court has condemned a prohibition on loitering as fatally vague even though police officers enforce those prohibitions by using objective tests, and even though persons are given actual notice that they are loitering in an impermissible manner prior to arrest.

4. The broadest language in *Papachristou*, coupled with decisions like the one below, also creates significant practical inhibitions on the exercise of state and local police powers in jurisdictions in which the law is not yet settled. Local governments in those jurisdictions may well be inhibited from experimentation by the fear of liability under 42 U.S.C. § 1983, which accrues without any qualified immunity. See *Owen v. City of Independence*, 445 U.S. 622 (1980). Any loitering ordinance, especially when enacted in a city of substantial size, will necessarily result in a large number of arrests, and accordingly will generate immense potential liability should the ordinance ultimately be found to be unconstitutional. Thus, guidance

from this Court on the scope of *Papachristou* is all the more urgent.

* * * *

With the growth of community-oriented policing, and its new emphasis on enforcement of public order offenses as part of an effort to promote stability in local communities, loitering laws have come to be recognized as an important weapon in the arsenal of law enforcement. *Papachristou*, however, casts a considerable legal cloud over the authority of local governments to enforce such public order offenses. The uncertainties that its broadest language have created are amply reflected in the confusing and conflicting lines of precedent that it has spawned. As Professor Livingston has observed, clarification of the law in this area "is thus important in an era in which community and problem-oriented policing styles, with their heightened emphasis on quality-of-life problems, are widespread." Livingston, *supra* at 627. Accordingly, plenary review is warranted to resolve the conflict in the lower courts, clarify the scope of state and local police powers, and grant state and local governments the breathing room they need to develop proactive and community-oriented law enforcement tools to combat gang crime.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Oct. 17, 1997]

SUPREME COURT OF ILLINOIS

Docket Nos. 80479, 80485, 80668
cons.—Agenda 12—November 1996

THE CITY OF CHICAGO,
Appellant,

v.

JESUS MORALES *et al.*,
Appellees.

JUSTICE NICKELS delivered the opinion of the court.

These consolidated appeals involve 70 defendants who were charged with violating the City of Chicago's Gang Congregation Ordinance (Chicago Municipal Code § 8-4-015 (added June 17, 1992)). In cause No. 80668, defendant Youkhana and 13 other defendants were charged with violating the ordinance. The Cook County circuit court granted defendants' motion to dismiss the city's actions against them, finding the ordinance unconstitutionally vague. The appellate court affirmed, holding the ordinance unconstitutional on several grounds. *Youkhana*, 277 Ill. App. 3d 101.

In cause No. 80485, the Cook County circuit court dismissed the charges against defendant Ramsey and 49 other defendants, also finding the ordinance unconstitutional. In cause No. 80479, after separate bench trials in the Cook County circuit court, defendant Morales and five other defendants were found guilty of violating the ordi-

nance and each sentenced to jail terms ranging from 1 to 27 days. The appellate court reversed the convictions of the *Morales* defendants based on its holding in *Youkhana* (*Morales*, Nos. 1-93-4039, 1-93-4351, 1-93-4356, 1-94-1542, 1-94-3065, 1-94-4062 cons. (unpublished order under Supreme Court Rule 23)), and affirmed the dismissal of the actions against the *Ramsey* defendants (*Ramsey*, Nos. 1-93-4125, 1-93-4126, 1-94-0220, 1-94-0876, 1-94-0877, 1-94-1541, 1-95-0191, 1-95-0246 cons. (unpublished order under Supreme Court Rule 23)). The appellate court granted the city's request for a certificate of importance in *Youkhana* (155 Ill. 2d R. 316), and this court granted the city's petitions for leave to appeal in the other two causes (155 Ill. 2d R. 315). We consolidated the three causes for purposes of this appeal.

BACKGROUND

In May 1992, the Chicago city council held hearings to explore the problems criminal street gangs present for the city's residents. Of particular concern was the problems gang members cause by loitering in public. Witnesses testified how gang members loiter as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary community residents. Testimony revealed that street gangs are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism.

As a result of the hearings, the city council enacted the Gang Congregation Ordinance, more commonly known as the "gang loitering ordinance." The city council incorporated its findings in the preamble to the ordinance, as follows:

> "WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and

> WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and
>
> WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and
>
> WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
>
> WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and
>
> WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and
>
> WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and
>
> WHEREAS, Aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear[.]" Chicago Municipal Code § 8-4-015 (added June 17, 1992).

The gang loitering ordinance provides in pertinent part:

> "(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street

gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this section:

(1) 'Loiter' means to remain in any one place with no apparent purpose.

(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

* * * *

(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned." Chicago Municipal Code § 8-4-015 (added June 17, 1992).

Each violation of the ordinance is punishable by a fine of up to $500, imprisonment for not more than six months, and the requirement to perform up to 120 hours of community service.

During the hearings, representatives of the Chicago law and police departments informed the city council that any limitations on the discretion police have in enforcing the ordinance would be best developed through police policy, rather than placing such limitations into the ordi-

nance itself. Accordingly, after the gang loitering ordinance was enacted, the Chicago police department issued a general order which provides guidelines for enforcement of the ordinance. Among other things, the general order sets forth standards for identifying criminal street gangs and specifies criteria for establishing probable cause that an individual is a member of a criminal street gang. Chicago Police Department, General Order No. 92-4 (eff. August 8, 1992).

Once enforcement of the gang loitering ordinance began, the circuit courts of Cook County disagreed as to its validity. Upon review, the appellate court held the ordinance unconstitutional on several grounds. First, the appellate court found the ordinance unconstitutionally overbroad because it violates the first amendment rights of association, assembly, and expression. In addition, the appellate court found that the ordinance was unconstitutionally vague. Next, the appellate court determined the ordinance criminalizes a person's status in violation of the eighth amendment. Finally, the appellate court determined the ordinance allows arrests without probable cause, in violation of the fourth amendment. *Youkhana*, 277 Ill. App. 3d 101.

The city urges that the judgment of the appellate court be reversed because the gang loitering ordinance: (1) sufficiently defines criminal conduct such that it is not unconstitutionally vague; (2) is not overbroad because it is a permissible restriction of first amendment rights; (3) does not create a status offense; and (4) requires the police to establish probable cause of illegal conduct before an offender can be arrested.

We find that the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties. In doing so, we need not reach the issues that the ordinance creates a status offense, permits arrests without probable cause or is overbroad.

ANALYSIS

In construing a municipal ordinance, the same rules are applied as those which govern the construction of statutes. *In re Application of the County Collector*, 132 Ill. 2d 64, 72 (1989). Statutes are presumed constitutional and it is the court's duty to construe a legislative enactment so as to affirm its constitutionality and validity, if it is reasonably susceptible to such a construction. *People v. Haywood*, 118 Ill. 2d 263, 271 (1987). The fundamental rule of statutory construction is to ascertain and give effect to the true intent and meaning of the lawmakers. *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill. 2d 76, 81 (1994). In doing so, the courts should look first to the statutory language, for the language of the statute is the best indication of the lawmaker's intent. *Williams v. Illinois State Scholarship Comm'n*, 139 Ill. 2d 24, 51 (1990). Where the meaning of an enactment is clear and unambiguous, a court must give it effect as written, without reading into it limitations or conditions that the lawmakers did not express. *Garza v. Navistar International Transportation Corp.*, 172 Ill. 2d 373, 378 (1996). Moreover, criminal statutes are to be strictly construed in favor of an accused and nothing should be taken by intendment or implication beyond the obvious or literal meaning of the statute. *People v. Woodward*, 175 Ill. 2d 435, 444 (1997).

I. Vagueness

A cornerstone of our jurisprudence is that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 2. A well-established element of the guarantees of due process is the requirement that the proscriptions of a criminal statute be clearly defined. *Haywood*, 118 Ill. 2d at 269, citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227, 92 S. Ct. 2298,

2298-99 (1972). To successfully challenge a criminal statute as being vague on its face, the statute must be impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 71 L. Ed. 2d 362, 369, 102 S. Ct. 1186, 1191 (1982); *Haywood*, 118 Ill. 2d at 270. That is, the statute must be shown to be vague "in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 217, 91 S. Ct. 1686, 1688 (1971). If on its face the challenged statute violates the due process clause, then the specific details of the individual offense would not serve to validate the statute. *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 83 L. Ed. 888, 890, 59 S. Ct. 618, 619 (1939).

To satisfy the vagueness doctrine, a criminal statute must meet two basic criteria. First, a criminal statute must be sufficiently definite so that it gives persons of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct. *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 909, 103 S. Ct. 1855, 1858 (1983); *Grayned*, 408 U.S. at 108, 33 L. Ed. 2d at 227, 92 S. Ct. at 2298-99; *People v. Bailey*, 167 Ill. 2d 210, 228 (1995). Second, a penal statute must adequately define the criminal offense in such a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357-58, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858; *Haywood*, 118 Ill. 2d at 269; see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 115, 92 S. Ct. 839, 843 (1972). We evaluate the provisions of the gang loitering ordinance in light of the due process criteria.

A. *Adequate Notice*

The first criterion of the void-for-vagueness doctrine requires a criminal statute to be sufficiently defined so it provides persons of ordinary intelligence adequate notice of proscribed conduct. *Kolender*, 461 U.S. at 357, 75

L. Ed. 2d at 909, 103 S. Ct. at 1858; *Grayned*, 408 U.S. at 108, 33 L. Ed. 2d at 227, 92 S. Ct. at 2298-99; *Bailey*, 167 Ill. 2d at 228. Due process guarantees this adequate notice of proscribed conduct so that ordinary persons are not required to guess at a law's meaning but, rather, can know what conduct is forbidden and act accordingly. *Flipside, Hoffman Estates, Inc.*, 455 U.S. at 498, 71 L. Ed. 2d at 371, 102 S. Ct. at 1193; *Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126, 127 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta*, 306 U.S. at 453, 83 L. Ed. at 890, 59 S. Ct. at 619.

Loitering and vagrancy statutes have been utilized throughout American history in an attempt to prevent crime by removing "undesirable persons" from public before they have the opportunity to engage in criminal activity. See *Papachristou*, 405 U.S. at 161-63, 31 L. Ed. 2d at 114-16, 92 S. Ct. at 842-44; see generally Model Penal Code § 250.6, Commentary (1980); Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 Ohio St. L.J. 717 (1989). Nevertheless, it is well settled that broadly worded criminal loitering laws which prohibit loitering without additional unlawful conduct are doubtlessly unconstitutional. See, *e.g.*, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90, 15 L. Ed. 2d 176, 179, 86 S. Ct. 211, 213 (1965).

The gang loitering ordinance provides that "[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section." Chicago Municipal Code § 8-4-015 (added June 17, 1992).

The city argues that the terms of the ordinance are sufficiently definite so that ordinary persons can comprehend the prohibited conduct. We disagree.

The ordinance seeks to criminalize acts of "loitering" in a public place. Webster's defines "loiter" to mean "to remain in or near a place in an idle or apparently idle manner" and to "hang around aimlessly." Webster's Third New International Dictionary 1331 (1981). The infirmity with this type of prohibition is that it fails to distinguish between innocent conduct and conduct calculated to cause harm and "makes criminal activities which by modern standards are normally innocent" (*Papachristou*, 405 U.S. at 163, 31 L. Ed. 2d at 116. 92 S. Ct. at 844). Although persons of ordinary intelligence may maintain a common and accepted meaning of the word "loiter," such term by itself is inadequate to inform a citizen of its criminal implications. See *Territory of Hawaii v. Anduha*, 48 F.2d 171, 172-73 (9th Cir. 1931); *Arizona ex rel. Williams v. City Court*, 21 Ariz. App. 489, 491, 520 P.2d 1166, 1168 (1974); *State v. Hudson*, 111 N.H. 25, 26 274 A.2d 878, 879 (1971); *People v. Diaz*, 4 N.Y.2d 469, 471, 151 N.E.2d 871, 872, 716 N.Y.S.2d 313, 315 (1958).

The city cites *Wiemerslage v. Maine Township High School District 207*, 29 F.3d 1149 (7th Cir. 1994), for the proposition that the term "loiter" is not unconstitutionally vague. The *Wiemerslage* holding is not applicable to the instant case. At issue in *Wiemerslage* was the validity of a high school disciplinary rule prohibiting loitering in a specific area of campus. The federal court of appeals, in finding that the prohibitions of the disciplinary rule were not vague, expressly observed that criminal loitering laws are subject to a more stringent standard of specificity. *Wiemerslage*, 29 F.3d at 1152.

Moreover, the definition of "loiter" provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance. The ordinance defines "loiter"

to mean "to remain in any one place with no apparent purpose." Chicago Municipal Code § 8-4-015(c)(1) (added June 17, 1992). People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer.

Courts in several other jurisdictions have found similarly worded prohibitions of criminal loitering statutes unconstitutionally vague. See, *e.g.*, *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974) (loitering without apparent reason), *aff'd sub nom. Lefkowitz v. Newsome*, 420 U.S. 283, 43 L. Ed. 2d 196, 95 S. Ct. 886 (1975); *Powell v. Stone*, 507 F.2d 93, 95 (9th Cir. 1974) (loitering without apparent reason), *rev'd on other grounds*, 428 U.S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976); *Ricks v. District of Columbia*, 414 F.2d 1097, 1107 (D.C. Cir. 1968) (loitering without visible business); *Kirkwood v. Loeb*, 323 F. Supp. 611, 614-15 (W.D. Tenn. 1971) (loitering without any legitimate purpose); *In re C.M.*, 630 P.2d 593, 596 (Colo. 1981) (loitering without legitimate reason); *People v. Berck*, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33 (1973) (loitering without apparent reason).

In addition, the city cites several cases for the proposition that an ordinance prohibiting loitering alone is sufficiently defined to pass the void-for-vagueness test. However, in all of the cases cited by the city, the courts upheld ordinances which criminalized loitering combined with some other overt act or criminal intent. See, *e.g.*, *Williams*, 21 Ariz. App. at 491, 520 P.2d at 1168 (loitering for purpose of begging); *People v. Superior Court*, 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988) (loitering to solicit lewd or unlawful act);

State v. Ecker, 311 So. 2d 104 (Fla. 1975) (loitering in an unusual manner under circumstances which warrant alarm); *Bell v. State*, 252 Ga. 267, 313 S.E.2d 678 (1984) (same); *State v. Armstrong*, 282 Minn. 39, 162 N.W.2d 357 (1968) (loitering with intent to solicit prostitution). Moreover, several of the cases cited by the city expressly recognize that a law which criminalizes "loitering" alone would be unconstitutionally vague. See, *e.g.*, *Williams*, 21 Ariz. App. at 491, 520 P.2d at 1168; *Ecker*, 311 So. 2d at 107; *Camarco v. City of Orange*, 116 N.J. Super. 531, 534, 283 A.2d 122, 16 (1971). The city's argument is without merit.

These cases demonstrate that when the term "loitering" is joined with a second specific element to form the prohibited conduct defined by a criminal loitering statute, courts have uniformly found that the law sufficiently informs persons as to the forbidden conduct and, thus, is not vague. The city contends, in the alternative, that the gang loitering ordinance's prohibited conduct is made up of specific elements in addition to mere loitering.

1. Loitering With a Criminal Street Gang Member

First, the city argues that the ordinance prohibits loitering with the additional element of being with a member of a criminal street gang. Initially, we must observe that, literally read, the gang loitering ordinance does not prohibit loitering with a criminal street gang member. Rather, the ordinance requires only that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member.

However, a reasonable belief, or probable cause, is insufficient to support a criminal conviction. See *People v. Nash*, 173 Ill. 2d 423, 431 (1996). In addition, this added element is itself vague, as it conveys no precise warning of the proscribed conduct understandable by an ordinary person. An individual standing on a street corner with a group of people has no way of knowing

whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang. That condition depends solely on the police officer's subjective evaluation of the facts of the situation in light of his own experience. See *Kolender*, 461 U.S. at 368-69, 75 L. Ed. 2d at 916, 103 S. Ct. at 1864 (Brennan, J., concurring).

If the city intended to require actual knowledge on a defendant's part of another loiterer's gang membership, then that knowledge must be established as a fact in order to support a conviction. See *Lanzetta*, 306 U.S. at 458, 83 L. Ed. at 893, 59 S. Ct. at 621; accord *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d 277 (1997) (imposing requirement of actual knowledge on part of defendant of other party's gang membership status in order for injunction to pass scrutiny under the vagueness doctrine). Although the ordinance provides an affirmative defense which allows the defendant to show that no one in the group was actually a gang member, this affirmative defense does not cure the defect. Showing that one person in a group of loiterers is a gang member does not ultimately prove that a defendant had knowledge of that fact. Furthermore, even adding a knowing association with a gang member to the act of loitering is still insufficient because the city cannot "forbid, on pain of criminal punishment, assembly with others merely to advocate activity, even if that activity is criminal in nature" (*People v. Nash*, 173 Ill. 2d 423, 431-32 (1996), citing *Brandenburg v. Ohio*, 395 U.S. 444, 448-49, 23 L. Ed. 2d 430, 434-35, 89 S. Ct. 1827, 1830 (1969)).

2. Failure to Obey a Dispersal Order

The city contends that another specific element of the offense of gang loitering is the failure to obey a police order to disperse. This is also insufficient to cure the vagueness of the ordinance. In *Shuttlesworth*, the Supreme Court reviewed a conviction pursuant to an ordinance which made it " 'unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on.' " *Shuttlesworth*, 382 U.S. at 90-92, 15 L. Ed. 2d at 179-80, 86 S. Ct. at 213-14. The Court determined that, as written, the ordinance was unconstitutionally vague because it allowed a person to "stand on a public sidewalk *** only at the whim of any police officer." *Shuttlesworth*, 382 U.S. at 90-92, 15 L. Ed. 2d at 179-80, 86 S. Ct. at 213-14.

The proscriptions of the gang loitering ordinance are essentially the same as the *Shuttlesworth* ordinance. Merely adding the elements of refusing to obey an order by police to disperse does not elevate the gang loitering ordinance to such a level that it provides adequate notice of proscribed conduct. See *State v. Hudson*, 111 N.H. at 26, 274 A.2d at 879 (merely loitering cannot be made criminal, even if statute requires refusal of police's order to disperse); *Kirkwood*, 323 F. Supp. at 616 (violation of loitering ordinance conditioned upon failure to move when directed to do so by police officer includes unconstitutionally vague standards). Moreover, this determination is consistent with our prior holdings. See, *e.g.*, *City of Chicago v. Meyer*, 44 Ill. 2d 1, 5 (1969) (police may arrest persons for failing to obey an order to cease otherwise lawful conduct, but only after the police have made all reasonable efforts to maintain order and the conduct produces an imminent threat of uncontrollable violence or riot).

Furthermore, if the underlying statute is itself impermissibly vague, as the gang loitering ordinance here, then a conviction based upon failure to obey the order of a police officer pursuant to that statute cannot stand. See *Shuttlesworth*, 382 U.S. at 90-92, 15 L. Ed. 2d at 179-80, 86 S. Ct. at 213-14. The city correctly observes that it is free to prevent people from obstructing traffic and blocking the public way. However, it must do so "through the

enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." *Coates*, 402 U.S. at 614, 29 L. Ed. 2d at 217, 91 S. Ct. at 1688, citing *Gregory v. City of Chicago*, 394 U.S. 111, 118, 124-25, 22 L. Ed. 2d 134-40, 139, 143, 89 S. Ct. 946, 950, 953-54 (1969) (Black, J., concurring, joined by Douglas, J.).

For these reasons, we find that the gang loitering ordinance fails to meet the adequate notice standards of the vagueness doctrine.

B. *Arbitrary Enforcement*

The second and more important aspect of the vagueness doctrine is the requirement that a penal statute must adequately define a criminal offense in such a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357-58, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858; *Haywood*, 118 Ill. 2d at 269; see also *Papachristou*, 405 U.S. at 162, 31 L. Ed. 2d at 115, 92 S. Ct. at 843. Where lawmakers fail to provide minimal guidelines to govern law enforcement, a criminal law "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858, quoting *Smith v. Goguen*, 415 U.S. 566, 575, 90 L. Ed. 2d 605, 613, 94 S. Ct. 1242, 1248 (1974). Moreover, when a law fails to provide standards regulating the exercise of its discretion, "the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. [The law] furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' " *Papachristou*, 405 U.S. at 170, 31 L. Ed. 2d at 120, 92 S. Ct. at 847, quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 84 L. Ed. 2d 1093, 1100, 60 S. Ct. 736, 742 (1940).

The gang loitering ordinance fails to meet these standards. The ordinance provides such ambiguous definitions of its elements that it does not discourage arbitrary or discriminatory enforcement. The definition of loitering as "to remain in any one place with no apparent purpose" provides absolute discretion to police officers to decide what activities constitute loitering. Moreover, police are given complete discretion to determine whether any members of a group are gang members. These guidelines do not conform with accepted standards for defining a criminal offense.

Where a criminal ordinance vests unfettered discretion in the police to determine whether a suspect's conduct has violated the ordinance, it "entrust[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat' " (*Smith*, 415 U.S. at 575, 39 L. Ed. 2d at 613, 94 S. Ct. at 1248, quoting *Gregory v. City of Chicago*, 394 U.S. 111, 120, 22 L. Ed. 2d 134, 141, 89 S. Ct. 946, 951 (1969) (Black, J., concurring, joined by Douglas, J.)), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation" (*Lewis v. City of New Orleans*, 415 U.S. 130, 135, 39 L. Ed. 2d 214, 220, 94 S. Ct. 970, 973 (1974) (Powell, J., concurring)).

The city does not dispute that the ordinance grants the police department a vast amount of discretion in its enforcement. In fact, the city itself points out that the Chicago police department urged the city council to exclude from the ordinance any limitations on the discretion the police hold in enforcing the ordinance. Notwithstanding that fact, the city contends that the general order of the police department should be considered a limiting construction of the ordinance, thus curing its vagueness. However, the general police order does not save the ordinance from being impermissibly vague.

We observe that lawmakers may not abdicate their responsibilities for setting the standards of the criminal law.

Smith, 415 U.S. at 575, 39 L. Ed. 2d at 613, 94 S. Ct. at 1248. It is the duty of the lawmakers to establish minimal guidelines to govern law enforcement. *Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858. Moreover, although the general police order goes to great lengths to define criminal street gangs, it does absolutely nothing to cure the imprecisions of the definition of the "loitering" element of the crime. In addition, a thorough examination of the record reveals that police officers have not followed the guidelines of the general order in a uniform manner.[1]

Furthermore, the gang loitering ordinance is not reasonably susceptible to a limiting construction which would affirm its validity. Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets. As the Supreme Court has observed, ordinances such as the gang loitering ordinance are drafted in an intentionally vague manner so that persons who are undesirable in the eyes of police and prosecutors can be convicted even though they are not chargeable

[1] In one example, the general order provides that probable cause of a defendant's membership in a criminal street gang can be substantiated by his wearing distinctive colors indicative of a specific criminal street gang. However, the general order expressly states that gang "membership may not be established solely because an individual is wearing clothing available for sale to the general pubic." Chicago Police Department, General Order No. 92-4, par. V (eff. August 8, 1992). Despite this express limitation, defendant Morales was arrested and convicted of violating the gang loitering ordinance even though the arresting officer testified that his only basis for determining that Morales was a gang member was that Morales wore black and blue clothing, which are the colors of the Gangster Disciples criminal street gang.

with any other particular offense. *Papachristou*, 405 U.S. at 166, 31 L. Ed. 2d at 118, 92 S. Ct. at 845. Laws such as these tend "to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse *** is self-evident." *Lewis*, 415 U.S. at 136, 39 L. Ed. 2d at 221, 94 S. Ct. at 974 (Powell, J., concurring).

We empathize with the city council's objectives in enacting the gang loitering ordinance. Criminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens. Nevertheless, as important as it is to abate this problem, the city cannot fight gang crime through the enactment and enforcement of an ordinance that fails to meet constitutional standards for definiteness and clarity. *Kolender*, 461 U.S. at 361, 75 L. Ed. 2d at 911, 103 S. Ct. at 1860, citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 83 L. Ed. 888, 890, 59 S. Ct. 618, 619 (1939).

II. Substantive Due Process

Defendants also contend that the gang loitering ordinance is an arbitrary exercise of the city's police power and, thus, violates substantive due process. The city responds that defendants have no constitutional right to loiter. We agree with defendants.

The city is incorrect in its contention that the gang loitering ordinance intrudes upon no constitutionally protected activity. In *Papachristou*, the Supreme Court reviewed a statute which prohibited, among other things, the acts of loafing, loitering, and nightwalking. The Court observed that, although not expressly mentioned in the Constitution, such activities are amenities of American life. *Papachristou*, 405 U.S. at 164, 31 L. Ed. 2d at 117, 92 S. Ct. at 844. The freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process clause. See *City of Chicago v. Wilson*, 75 Ill. 2d 525, 529-30 (1978), citing *Kelley v. Johnson*, 425

U.S. 238, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1976); see also *Swank v. Smart*, 898 F.2d 1247, 1251-52 (7th Cir. 1990).

Among those protected personal liberties which have long been rcognized are the general right to travel (see, *e.g., Shapiro v. Thompson*, 394 U.S. 618, 629, 22 L. Ed. 2d 600, 612, 89 S. Ct. 1322, 1329 (1969) (constitutional concepts of personal liberty require that all citizens be free to travel throughout the land uninhibited by laws which unreasonably burden or restrict this movement), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)), the right of locomotion (see, *e.g., Anduha*, 48 F.2d at 172, quoting *Pinkerton v. Verberg*, 78 Mich. 573, 584, 44 N.W. 579, 582 (1889) (the right to go where and when one pleases)[)], the right to freedom of movement (*Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 910, 103 S. Ct. at 1859), and the general right to associate with others (*Swank*, 898 F.2d at 1252). The gang loitering ordinance impedes upon all of these personal liberty interests.

We recognize that such personal liberties are not absolute. Only governmental actions which intrude upon personal liberties arbitrarily or in an utterly unreasonable manner violate the due process clause. See *Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill. 2d 443, 453 (1979). Nevertheless, we find that the gang loitering ordinance unreasonably infringes upon personal liberty. Persons suspected of being in criminal street gangs are deprived of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime. As one trial judge warned one of defendants below, "[the police] will lock you up just for being who you are." Such laws, arbitrarily aimed at persons based merely on the suspicion that they may commit some future crime, are arbitrary and likely to be enforced in a

discriminatory manner. See *Papachristou*, 405 U.S. at 166, 31 L. Ed. 2d at 118, 92 S. Ct. at 845.

The city is not helpless in its war against the criminal activity of gangs. Many of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts. See, *e.g.*, 720 ILCS 5/12-6 (West 1996) (intimidation); 720 ILCS 5/12-6.1 (West 1996) (compelling organization membership of persons); 720 ILCS 5/12-6.2 (West 1996) (aggravated intimidation—a gang member committing the offense of intimidation for the purpose of furthering gang activities); 720 ILCS 5/25-1 (West 1996) (mob action). However, the city cannot empower the police to sweep undesirable persons from the public streets through vague and arbitrary criminal ordinances.

We hold the [sic] that the gang loitering ordinance is an arbitrary restriction on personal liberty and, thus, violates substantive due process. Therefore, we need not determine whether the gang loitering ordinance impermissibly infringes on either the first amendment right of expressive association or the fundamental right of intimate association, both of which command a much higher level of scrutiny. See, *e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 623, 82 L. Ed. 2d 462, 474-75, 104 S. Ct. 3244, 3252-53 (1984).

For the foregoing reasons, the judgments of the appellate court are affirmed.

Appellate court judgments affirmed.

APPENDIX B

First Division
December 18, 1995

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

1-93-3909

THE CITY OF CHICAGO,
Plaintiff-Appellant,

v.

JAMES YOUKHANA, FERNANDO O. COTA, JOSE A. MERCED, ROOSEVELT MCMULLAN, JR., JOHNNY R. NEWSOME, ANTHONY D. CORDERO, JULIO M. BARROSO, HERMIE J. KHAMO, LAMONT J. JORDAN, LISA GONZALES, FLORENTINE SOTO, RENEE GOODWILL, TASHA WHITE and SABRINA BROWN,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County
Honorable Thaddeus L. Kowalski, Judge Presiding

JUSTICE BUCKLEY delivered the opinion of the court:

The City of Chicago (the City) prosecuted defendants for violating section 8-4-015 of the Municipal Code of Chicago, more commonly known as the "gang-loitering ordinance." (Chicago Municipal Code § 8-4-015 (1992).) Defendants moved to dismiss the City's action against

them, and on September 29, 1993, the circuit court granted the defendants' motion, finding that the ordinance violated the United States and Illinois Constitutions. The City appeals the circuit court order, and we must affirm.

We base our decision on several grounds, the strongest of which is that this ordinance violates the freedoms of association, assembly and expression secured by the first amendment and article I, section 5, of the Illinois Constitution. The ordinance also suffers from the infirmity of being unconstitutionally vague, thus violating due process rights. Furthermore, we find that the ordinance unconstitutionally criminalizes status and allows arrests without probable cause in violation of the fourth amendment.

BACKGROUND

Like many other American cities, Chicago is home to criminal street gangs. In 1992, the City held hearings on the subject of gang-related crime. Based on these hearings, the City determined that criminal street-gang activity in Chicago was largely responsible for the increasing murder rate in the City. The City also concluded that the presence of gang members in public places is intimidating to law-abiding citizens. The City recognized that gangs operate by establishing control over identifiable areas, by loitering and intimidating others from entering those areas. However, by ceasing to commit crimes, such as drug dealing and vandalism, when police officers are present, the gang members avoid arrest while maintaining control over their territory. This obvious connection between gang crime and loitering led the City to enact the ordinance at issue here. The gang-loitering ordinance provides in pertinent part:

> "(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area.

Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this Section:

(1) 'Loiter' means to remain in any one place with no apparent purpose.

(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

* * *

(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned."

Chicago Municipal Code § 8-4-015 (1992).

After the ordinance was adopted, the Chicago police department promulgated a general order to define the circumstances under which members of the department are permitted to enforce the ordinance. Authorized officers are directed to order persons loitering in a designated area "to disperse and remove themselves from the area" when there is probable cause to believe that at least one of those persons is a criminal street-gang member. The officers are then directed to arrest and charge "any person who does not promptly obey such an order." The order requires the arresting officer to complete the arrest report for each arrest, which provides specific reasons for a conclusion of probable cause that the arrestee was either a

criminal street gang or a person loitering in a group with a gang member. General Order No. 92-4, at 3 (1992).

Probable cause to establish membership is substantiated by the officers' experience and knowledge of the alleged offenders and reliable information such as admission of membership, uses of gang symbols, or identification of reliable informants. (General Order No. 92-4, at 2 (1992).) The district commanders must maintain and update gang information files and ensure that they contain only names of individuals the department has concluded it has probable cause to believe are members of criminal street gangs operating within the district. The order also provides that the criminal street gangs in each area must be identified "on the basis of specific, documented and reliable information," such as officer observations, analysis of crime pattern information, and interviews with witnesses, admitted gang members and reliable informants.

According to the general order, the ordinance may be enforced only in portions of the City where loitering by street gangs has posed a demonstrable problem for the surrounding community. In deciding which areas to designate, district commanders must consult with knowledgeable members of the department and appropriate community groups. They must also use crime pattern information, citizen complaints, police observations, and the views of local public officials and other reliable members of the community.

On June 15, 1993, defendants, James Youkhana, Fernando O. Cota, Jose A. Merced, Roosevelt McMullan, Jr., Johnny R. Newsome, Anthony D. Cordero, Julio M. Barroso, Hermie J. Khamo, Lamont J. Jordan, Lisa Gonzales and Florentine Soto, were arrested at 1433 West Carmen in Chicago and charged with violating the ordinance. According to the complaints filed against them, the defendants were "observed loitering at 1433 W. Carmen, a public place with one or more persons at least

one of whom was a member of the Latin Kings criminal street gang, and *** failed to disperse and remove [themselves] from the area when ordered to do so by the [Police] [Officer] R. Day #4476." Defendants Sabrina Brown, Tasha White, and Renee Goodwill were arrested on June 22, 1993, and charged with violating the ordinance by loitering in the vicinity of 1528 West Morse in Chicago. The arrest reports indicate that they are members of the Gangster Disciple street gang. After being warned to leave the area "at 2145 hrs," they were found to be loitering in the same area and refused to leave the area at 2200 hours.[1]

Defendants moved to dismiss the complaints against them on the ground that the ordinance is unconstitutional on its face, and as applied, in that it violates their rights under the fourteenth, first, and fourth amendments of the United States Constitution and the corresponding sections of the Illinois Constitution. The municipal court granted the motion and this appeal followed.

DISCUSSION

I

The overbreadth doctrine "allows a defendant to challenge the validity of a statute on its face when the mere existence of the statute may inhibit the exercise of expressive or associational rights protected by the first amendment, even though those rights do not protect the activities of the defendant." (*People v. Garrison* (1980), 82 Ill. 2d 444, 449, 412 N.E.2d 483, 486, citing *Bates v. State Bar* (1977), 433 U.S. 350, 380, 53 L. Ed. 2d 810, 833, 97 S. Ct. 2691, 2707; *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 611-17, 37 L. Ed. 2d 830, 839-

[1] Sabrina Smith's and Tasha White's arrest reports state that they were found loitering in the same area "at 2300 hrs," but the complaints filed against the three of them all state 2200 hours as the time they were found loitering the second time.

43, 93 S. Ct. 2908, 2915-18.) A law is overbroad if it authorizes punishment of constitutionally protected conduct. *City of Houston v. Hill* (1987), 482 U.S. 451, 458, 96 L. Ed. 2d 398, 410, 107 S. Ct. 2502, 2508.

The City argues that this ordinance is not overbroad because any expressive activity protected under the first amendment such as picketing and protesting is not implicated by the ordinance, as these activities have an apparent purpose. However, we agree with defendants' contention that the ordinance clearly implicates the first amendment rights of assembly, association, and expression.

In *Coates v. City of Cincinnati* (1971)[,] 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686, the United States Supreme Court found Cincinnati's loitering ordinance to be unconstitutionally broad. The ordinance made it a criminal offense for "three or more persons to assemble *** on any of the sidewalks *** and there conduct themselves in a manner annoying to persons passing by ***." (*Coates*, 402 U.S. at 611 n.1, 29 L. Ed. 2d at 216 n.1, 91 S. Ct. at 1687 n.1.) The Court stated: "The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct." (*Coates*, 402 U.S. at 615, 29 L. Ed. 2d at 218, 91 S. Ct. at 1689.) The Court emphasized that an ordinance cannot make a crime out of conduct that cannot be a crime under the Constitution. *Coates*, 402 U.S. at 616, 29 L. Ed. 2d at 218, 91 S. Ct. at 1689.

The Supreme Court upheld a disorderly conduct statute, as construed by the State court, in *Colten v. Kentucky* (1972), 407 U.S. 104, 32 L. Ed. 2d 584, 92 S. Ct. 1953. The Kentucky statute made it an offense for a

person with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, to congregate with others in a public place and refuse to comply with a lawful police dispersal order. The Kentucky Court of Appeals construed the statute to apply only where there is no *bona fide* intention to exercise a constitutional right or where the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise. The Supreme Court held that the statute as applied did not chill or stifle the exercise of any constitutional right because the State court made a finding that Colten was not exercising a constitutional right at the time of his arrest and the evidence supported that finding. *Colten*, 407 U.S. at 109, 32 L. Ed. 2d at 589, 92 S. Ct. at 1957.

The City's ordinance infringes upon first amendment freedoms in several obvious ways. We read the ordinance to mean that when one gang member stands in public with a group of innocent non-gang members, all can be ordered to disperse, and all can be arrested for failing to disperse. The ordinance is triggered when a gang member is observed loitering; the innocent persons' conduct is irrelevant. In other words, the ordinance gives the police power to order dispersal and arrest those who associate with gang members in public places. This smacks of a police-state tactic and clearly violates the first amendment rights of the innocent persons.

That is not to say that the ordinance would be saved if only gang members could be ordered to disperse and arrested, or if the non-gang members also had to be found loitering before they could be subject to the ordinance. The ordinance clearly reaches conduct that the government has no business prohibiting. It prohibits loitering, or standing in one place "with no apparent purpose." It does not require that the loitering be done with an intent to cause alarm or anything of the sort. Standing in one place with no apparent purpose cannot be

made a crime, just as assembling on the sidewalks in a manner annoying to passersby could not be made a crime in *Coates*. *Coates*, 402 U.S. at 616, 29 L. Ed. 2d at 218, 91 S. Ct. at 1689.

The circuit court expressed its concern that this ordinance may apply to situations such as a social worker talking to a gang member or two people stargazing. We believe that this ordinance reaches conduct that is just as innocent, but not as obviously so. For example, the ordinance would apply to someone waiting with a friend or family member for a ride to the grocery store, or someone waiting outside a laundromat for their cloth[e]s to dry. It would also apply to two friends who see each other on the street and stop to talk. Unlike the ordinance in *Colten*, which required intent to cause public inconvenience or alarm, this ordinance is beyond saving by judicial construction.

Finally, we find this ordinance unconstitutional on an independent State ground. Article I, section 5, of the Illinois Constitution ensures the "right to assemble in a peaceable manner." For the reasons stated above, this ordinance also offends that section.

II

Local governments may exercise their police powers in order to regulate conduct in public places that jeopardizes the welfare of the public. "The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct." (*Coates v. City of Cincinnati* (1971), 402 U.S. 611, 614, 29 L. Ed. 2d 214, 217, 91 S. Ct. 1686, 1688.) However, a basic principle of due process is that "[all persons] are entitled to be informed as to what the State commands or forbids." (*Lanzetta v. New Jersey* (1939), 306 U.S. 451, 453, 83 L. Ed. 888, 890, 59 S. Ct. 618, 619; see also *Grayned v. City of Rockford* (1972), 408 U.S. 104, 108, 33 L. Ed.

2d 222, 227, 92 S. Ct. 2294, 2298-99. A criminal statute will be found void for vagueness if it fails to define the offense so that people of ordinary intelligence can understand what conduct is prohibited or if it encourages arbitrary and discriminatory enforcement. *Kolender v. Lawson* (1983), 461 U.S. 352, 357, 75 L. Ed. 2d 903, 909, 103 S. Ct. 1855, 1858; *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 162, 31 L. Ed. 2d 110, 115, 92 S. Ct. 839, 843.

A brief overview of the United States Supreme Court rulings on similar ordinances is helpful. In *Papachristou v. City of Jacksonville,* the Supreme Court found the City of Jacksonville's vagrancy ordinance void for vagueness. That ordinance provided: "Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses." *Papachristou,* 405 U.S. at 156 n.1, 31 L. Ed. 2d at 112 n.1, 92 S. Ct. at 840 n.1.

The court found that the ordinance did not give fair notice as to what conduct was forbidden and that it made criminal "activities which by modern standards are normally innocent." (*Papachristou,* 405 U.S. at 163, 31 L. Ed. 2d at 116, 92 S. Ct. at 844.) The Court noted that the activities forbidden by the ordinance "are historically part of the amenities of life as we have known them." (*Papachristou,* 405 U.S. at 164, 31 L. Ed. 2d at 117, 92 S. Ct. at 844.) The Court also found the ordinance flawed in that it placed unfettered discretion in the hands of the Jacksonville police. (*Papachristou,* 405 U.S. at 168, 31 L. Ed. 2d at 119, 92 S. Ct. at 846.) The law permitted arbitrary and discriminatory enforcement because there were no standards to be followed by the police in their exercise of discretion. (*Papachristou,* 405 U.S. at 170, 31 L. Ed. 2d at 120, 92 S. Ct. at 847.) The Court concluded:

> "A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment."
>
> *Papachristou,* 405 U.S. at 171, 31 L. Ed. 2d at 120, 92 S. Ct. at 848.

In *Coates v. City of Cincinnati* (1971), 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686, discussed above, the Court struck down as unconstitutional the Cincinnati loitering ordinance. The Court held that the ordinance was "unconstitutionally vague because it subject[ed] the exercise of the right of assembly to an unascertainable standard," that standard being whether or not a police officer is annoyed. *Coates,* 402 U.S. at 614, 29 L. Ed. 2d at 217, 91 S. Ct. at 1688.

In *Kolender v. Lawson* (1983), 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855, the challenged criminal statute required those "who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio,* 392 U.S. 1 (1968)."

(*Kolender*, 461 U.S. at 353, 75 L. Ed. 2d at 906, 103 S. Ct. at 1856.) The Court held that the statute, as it had been construed, was unconstitutionally vague. (*Kolender*, 461 U.S. at 353, 75 L. Ed. 2d at 906, 103 S. Ct. at 1856.) The statute provided no standards by which to determine whether the alleged offender had satisfied the requirement of providing a "credible and reliable" identification. The statute placed complete discretion in the hands of the police and created the " 'potential for arbitrarily suppressing First Amendment liberties.' " (*Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 910, 103 S. Ct. at 1859, quoting *Shuttlesworth v. City of Birmingham* (1965), 382 U.S. 87, 91, 15 L. Ed. 2d 176, 179, 86 S. Ct. 211, 213.) The Court also noted that the statute implicated "consideration of the constitutional right to freedom of movment." *Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 910, 103 S. Ct. at 1859.

An otherwise unconstitutionally vague provision can be saved by a strict reading from the State's judiciary. In *Shuttlesworth v. City of Birmingham* (1965), 382 U.S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211, the ordinance at issue provided:

> "It shall be unlawful for any person or any number of persons to so stand, loiter, or walk upon any street or sidewalk in the city so as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." *Shuttleworth*, 382 U.S. at 88, 15 L. Ed. 2d at 178, 86 S. Ct. at 212.

The Court found that literally read, the second part of this ordinance provided that a person could stand on a public sidewalk in Birmingham only at the whim of a police officer. (*Shuttlesworth*, 382 U.S. at 90, 15 L. Ed. 2d at 179, 86 S. Ct. at 213.) The Court stated, "[t]he constitutional vice of so broad a provision needs no

demonstration." (*Shuttlesworth*, 382 U.S. at 90, 15 L. Ed. 2d at 179, 86 S. Ct. at 213.) However, the Alabama Court of Appeals ruled that the ordinance applied only when a person who stands, loiters, or walks on a street or sidewalk so as to obstruct free passage or refuses to obey a request by an officer to move on. (*Shuttlesworth*, 382 U.S. at 91, 15 L. Ed. 2d at 180, 86 S. Ct. at 214.) The Court accepted the State judicial construction of the ordinance and held that the ordinance was not unconstitutional when construed in such a way. *Shuttlesworth*, 382 U.S. at 91, 15 L. Ed. 2d at 180, 86 S. Ct. at 214.

Defendants claim that the Chicago gang ordinance is void for vagueness because it does not sufficiently define what conduct is prohibited. The ordinance defines loitering as remaining in one place with "no apparent purpose." The circuit court found that the ordinance gives police complete discretion in deciding whom to stop. The City argues that "to remain in any one place with no apparent purpose" has a commonsense meaning of "doing nothing" and the word "loiter" has never been held to be unconstitutionally vague. The City also contends that the ordinance resolves any ambiguities with the requirement that actual notice be given in the form of a police order to disperse.

Although it may be true that the word "loiter" is not unconstitutionally vague, the loitering ordinances which have been upheld have included some type of description or requirement *in addition* to the word "loiter" to describe the conduct prohibited. For example, in *Shuttlesworth*, the ordinance was construed to prohibit loitering so "as to obstruct free passage." (*Shuttleworth*, 382 U.S. at 91, 15 L. Ed. 2d at 179, 86 S. Ct. at 213.) In *City of Milwaukee v. Nelson* (1989), 149 Wis. 2d 434, 439 N.W.2d 562, the Wisconsin Supreme Court upheld an ordinance prohibiting loitering "in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." (*Nelson*, 149 Wis. 2d at

438 n.1, 439 N.W.2d at 563 n.1.) The ordinance provided certain factors that the police officers could consider in determining whether alarm is warranted. See also *Bell v. State* (1982), 252 Ga. 267, 313 S.E.2d 678; *State v. Ecker* (Fla. 1975), 311 So. 2d 104.

In *City of Tacoma v. Luvene* (1992), 118 Wash. 2d 826, 827 P.2d 1374, the ordinance prohibited loitering "in a manner and under circumstances manifesting the purpose to engage in drug-related activity." (*Luvene*, 118 Wash. 2d at 836, 827 P.2d at 1379.) The Washington Supreme Court upheld the ordinance because it determined that an ordinary person would read the ordinance as prohibiting loitering in public and performing actions commonly associated with drug dealing. *Luvene*, 118 Wash. 2d at 846, 827 P.2d at 1385.

As stated above, we believe it would be impossible to save the Chicago ordinance by judicial construction. The ordinance does not qualify the term "loiter" in any way. It is simply the act of loitering by a gang member with others that triggers the ordinance. Furthermore, the fact that a police order to disperse must be disobeyed before an arrest does not save the ordinance from being unconstitutionally vague. A person cannot be punished for failing to obey a police order that is itself unconstitutional. *Wright v. Georgia* (1963), 373 U.S. 284, 291-92, 10 L. Ed. 2d 349, 355, 83 S. Ct. 1240, 1245.

We note that the Chicago police department is not a judicial agency and has no power to make a judicial determination of the meaning of an ordinance. Regardless, the department's construction and enforcement of the ordinance does not save it from being unconstitutionally vague. Although the department's general order provides standards for determining who is a gang member, the order does nothing to limit the complete discretion a police officer has in determining whether a person has "no apparent purpose" for remaining in one place. The

ordinance and general order are also completely silent as to exactly how fast and how far the persons have to disperse in order to avoid arrest.

The United States Supreme Court has determined that "the most important aspect of the vagueness doctrine 'is not actual notice, but * * * the requirement that a legislature establish minimal guidelines to govern law enforcement.' " (*Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858, quoting *Smith v. Goguen* (1974), 415 U.S. 566, 574, 39 L. Ed. 2d 605, 613, 94 S. Ct. 1242, 1248.) The City has failed to establish such guidelines here. For these reasons, we find this statute void for vagueness. Not only does it violate the principles of due process, but it also has a chilling effect on the exercise of first amendment rights. *Grayned v. City of Rockford* (1972), 408 U.S. 104, 109, 33 L. Ed. 2d 222, 228, 92 S. Ct. 2294, 2299.

III

We further find that the gang-loitering ordinance unconstitutionally criminalizes a person's status. In *Robinson v. California* (1962), 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417, the Supreme Court struck down a California statute which made it a misdemeanor for any person to be a drug addict. The Court held that the law violated the eighth amendment's cruel and unusual punishment clause because it made the status of drug addict a criminal offense regardless of whether the defendant had ever used or possessed drugs within the State. *Robinson*, 370 U.S. at 667, 8 L. Ed. 2d at 763, 82 S. Ct. at 1420-21.

The Court later held in *Powell v. Texas* (1968), 392 U.S. 514, 20 L. Ed. 2d 1254, 88 S. Ct. 2145, that an alcoholic could be found guilty of violating a statute that punished him for appearing in public while drunk. "Criminal penalties may be inflicted only if the accused * * * has committed some *actus reus*." (*Powell*, 392 U.S.

at 533, 20 L. Ed. 2d at 1268, 88 S. Ct. at 2154-5.) Since the statute did not punish the alcoholic when he appeared in public while sober, the statute punished conduct and not status.

A loitering ordinance was found to unconstitutionally criminalize status in *Farber v. Rochford* (N.D. Ill. 1975), 407 F. Supp. 529.) The Chicago ordinance at issue in *Farber* provided "It shall be unlawful for any habitual drunkard, any person known to be a prostitute, or any person who aids or abets prostitution, or for any person previously convicted of a felony, of prostitution, or of aiding and abetting prostitution, to assemble or congregate with other persons of any of the foregoing classes in or upon the public ways or other public places in the city or to loaf or loiter in or about or frequent the premises of any place where intoxicating liquors are sold." (*Farber*, 407 F. Supp. at 530.) Besides finding the ordinance unconstitutionally vague, the court also found that the ordinance focused on the status of a person rather than a person's conduct as a determinative factor of guilt. (*Farber*, 407 F. Supp. at 533.) The court rejected the argument that the ordinance did not make it an offense to be a habitual drunkard or prostitute but rather prohibited the *act* of congregating or loitering by these persons. "There is no actus reus at all required by the ordinance, only conduct which, while occasionally an 'adjunct to illicit behavior, is of itself perfectly defensible." *Farber*, 407 F. Supp. at 533.

We see little, if any, difference between the ordinance struck in *Farber* and the ordinance at issue here. The City argues that the ordinance applies to conduct and not status because it applies equally to loiterers whether or not they are members of a criminal street gang. We have to disagree. Once the ordinance is triggered, it may apply equally to persons regardless of gang membership, but the ordinance can only be triggered when a gang member is found loitering. In other words, the Chicago ordinance

prohibits gang members from loitering because they are gang members, not because they are loitering. Non-gang members and those not associating with gang members are not prohibited from loitering. Therefore, it is not the conduct, but the status, that triggers this ordinance.

IV

We finally note that the ordinance jeopardizes the rights guaranteed under the fourth amendment. The fourth amendment permits law enforcement officials to arrest a person only when there is probable cause to believe that person has committed or is committing a crime. (*Tennessee v. Garner* (1985), 471 U.S. 1, 7, 85 L. Ed. 2d 1, 7, 105 S. Ct. 1694, 1699.) In reference to a vagrancy ordinance, the Supreme Court stated in *Papachristou*:

> "We allow our police to make arrests only on 'probable cause' * * *. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality. Further criminality, however, is the common justification for the presence of vagrancy statutes." *Papachristou*, 405 U.S. at 169, 31 L. Ed. 2d at 119, 92 S. Ct. at 847.

This ordinance seems to us a transparent attempt to avoid the probable cause requirement. The City cited the difficulty police officers have in finding probable cause to arrest a gang member for crimes such as drug trafficking, vandalism, or intimidation, as a reason for promulgating the ordinance. The City cannot overcome this difficulty by making it a crime to be a gang member in a public place. Gang membership itself is not a crime, and standing in a public place with no apparent purpose is not a crime. Adding these actions together does not make them any more criminal. When you add nothing to nothing, you get nothing. The fact that gang members may have a higher propensity to commit crime does not give the City the authority to allow arrests without probable cause.

We appreciate the magnitude of the gang-related criminal activity and the adverse effects it has on our communities. However, our constitutional standards, fortunately, do not slide up and down a scale according to the gravity of the crime problem we wish to combat. If it were otherwise, the fundamental ideals on which this country is based would slowly deteriorate.

Accordingly, for the foregoing reasons, the order of the circuit court of Cook County is affirmed.

Affirmed.

CAMPBELL, P.J. and WOLFSON, J., concur.

APPENDIX C

First Division
December 29, 1995

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Nos. 1-93-4039, 1-93-4351, 1-93-4356,
1-94-1542, 1-94-3065, 1-94-4062) Cons.

CITY OF CHICAGO,
a Municipal Corp.,
Plaintiff-Appellee,

v.

JESUS MORALES, *et al.*,
Defendants-Appellants.

Appeal from the Circuit
Court of Cook County

Nos. 93MC1223795, 93MC1250371,
93MC1245666, 93MC1292604,
94MC1267906, 94MC1337706

Honorable JAMES B. LINN,
Honorable WILLIAM P. O'MALLEY,
Judges Presiding.

SUMMARY ORDER

Defendants, Gregorio Gutierrez, Sandy Garvin, Raul Jimenez, Jr., Daniel Washington, Jose Renteria and Jesus Morales, were found guilty of violating Chicago's gang-

loitering ordinance (Chicago Municipal Code § 8-4-015 (1992)), and they appeal their convictions. In *Chicago v. Youkhana* (1st Dist. December 18, 1995), No. 1-93-3909, this court found the ordinance to be in violation of the United States and Illinois Constitutions. Therefore, we reverse defendants' convictions under the ordinance.

Reversed in accordance with Supreme Court Rule 23 (c)(2).

BUCKLEY, J., with CAMPBELL, P.J. and WOLFSON, J., concurring.

APPENDIX D

First Division
December 29, 1995

IN THE
APPELLATE COURT OF ILLINIOS
FIRST JUDICIAL DISTRICT

Nos. 1-93-4125, 1-93-4126, 1-94-0220,
1-94-0876, 1-94-0877, 1-94-1541,
1-95-0191, 1-95-0246) Cons.

CITY OF CHICAGO,
a Municipal Corp.
Plaintiff-Appellant,

v.

MALCOLM RAMSEY, *et al.*,
Defendants-Appellees.

Appeal from the Circuit
Court of Cook County

Nos. 92MC1423997, 92MC1424444,
93MC1240541, 93MC1240542,
93MC1240582, 93MC1339427,
93MC1339484, 93MC1339486,
93MC1352401, 93MC1374870,
93MC1374871, 93MC1302116,
93MC1302497, 93MC1302728,
94MC1361275, 94MC1361276,
94MC1361277,

Honorable SAUL A. PERDOMO,
Honorable WENDELL P. MARBLY,
Judges Presiding.

SUMMARY ORDER

Defendants, Malcolm Ramsey, Neil Round, Christopher Lostroscio, Casey A. Mazeika, Karl T. Kelly, Jesse K. Paschke, Roy Delgado, Jr., Japheth Estrada, Jorge Lopez, Wladyslaw W. Jedrol, James J. Portway, Michael A. Mellero, Montee Radcliffe, Johnny M. Hall, Ronald J. Allison, Reginald Horton, Paris Bryant, Wesley Saffold, Eric Jones, Roshindaj Bryant, Leroy Minley, Jr., Eric Warren, Charlie Monden, Joseph Dell, Tywan Durnell Riley, Eric Miller, Jerry Cunningham, Eric Dennis, Vernon Diggs, Deandre Fitzpatrick, Darryl Hall, Cornelius Holt, Jonathan Lewis, Seth Lewis, Steve Reynolds, Claude Ross, Dushone Scott, Michael Simmons, Chester Sparks, Clarence Taylor, Michael Taylor, Stacey Wilson, Gabriel Ruiz, Maximilano Orozco, Ricardo Florez, Anibal Hernandez, Pablo Estrada, Juan Cruz, Andres Feliciano and Peter Quinones, were prosecuted for violating Chicago's gang-loitering ordinance (Chicago Municipal Code § 8-4-015 (1992)). The circuit court dismissed the City's actions against defendants, finding the ordinance unconstitutional, and the City appeals those judgments consolidated in this cause.

In *City of Chicago v. James Youkhana* (1st Dist. December 18, 1995), No. 1-93-3909, we held that the ordinance violates the United States and Illinois Constitutions. Thus, we affirm the judgment of the circuit court of Cook County.

Affirmed in accordance with Supreme Court Rule 23 (e)(2).

BUCKLEY, J., with CAMPBELL, P.J. and WOLFSON, J., concurring.

APPENDIX B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CRIMINAL DIVISION

Nos. 93 MC1 293363, 93 MC1 293364,
93 MC1 293365, 93 MC1 293366,
93 MC1 293367, 93 MC1 293367,
93 MC1 293370, 93 MC1 293372,
93 MC1 293373, 93 MC1 293375,
93 MC1 293369, 93 MC1 293368,
93 MC1 293728, 93 MC1 293729,
93 MC1 293730

CITY OF CHICAGO,
a municipal corporation,
Plaintiff,

vs.

JAMES YOUKHANA, FERNANDO O. COTA, JOSE A. MERCED, ROOSEVELT MCMULLAN JR., JOHNNY R. NEWSOME, ANTHONY D. CORDERO, JULIO M. BARROSO, HERMIE J. KHAMO, LAMONT J. JORDAN, LISA GONZALES, FLORENTINE SOTO, RENEE GOODWILL, TASHA WHITE, SABRINA BROWN,
Defendants.

MEMORANDUM AND ORDER

Defendants were arrested for violating City ordinance, Municipal Code of Chicago, Sec 8-4-015, titled Gang-related Congregations. This cause is before the court on defendants' motion to dismiss the complaints against them. Defendants argue that the ordinance on its face and as applied violates their constitutional rights under

the Fourteenth Amendment, First Amendment and Fourth Amendment to the United States Constitution and corresponding sections of the Illinois Constitution.

Municipal Code of Chicago, Sec 8-4-015 (Gang Congregation Ordinance) provides in relevant part:

> (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.
>
> (b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
>
> (c) As used in this section:
>
> (1) "Loiter" means to remain in any one place with no apparent purpose.
>
> (2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
>
> (5) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.

The City questions the defendants' right to challenge this ordinance arguing that the application of the ordinance to defendants' behavior was constitutional. Defendants challenge the ordinance as unconstitutional on its face. As such, the details of the offense intended to be charged

are not relevant to a vagueness challenge. Defendants' conduct could not validate the ordinance if it is otherwise unconstitutional. *Lanzetta v New Jersey*, 306 U.S. 451, 453 (1939); *Kolender v Lawson*, 461 U.S. 352 (1983). In addition, a third party may challenge an ordinance for overbreadth when the law chills constitutionally protected conduct, even if it is constitutional as applied to the litigant. *Brockett v Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *ACLU v Alexandria*, 747 F. Supp. 324 (1990). Defendants have standing to challenge this ordinance because first amendment activities are implicated by the Gang Congregation Ordinance including freedom of association and freedom of movement.[1]

I

Cities have been instituting loitering and vagrancy ordinances for centuries. It is well settled that an ordinance, like the Gang Congregation Ordinance, prohibiting loitering without more is unquestionably unconstitutional. *Shuttlesworth v Birmingham*, 382 U.S. 87, 90 (1965); *Camarco v City of Orange*, 61 N.J. 463, 465 (1972) (An ordinance which simply proscribed loitering or idling without more would be unconstitutional); *State v Ecker*, 311 So.2d 104, 107 (Fla. 1975) (If the ordinance merely proscribed loitering or idling without more, it would be unconstitutional). Because the Gang Congregation Ordinance proscribes loitering without restriction, it cannot stand.

In *Shuttlesworth*, the Supreme Court explicitly found a virtually identically worded ordinance unconstitutional. The ordinance in Shuttleworth provided: "It shall be unlawful for any person or any number of persons to so

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[1] The right to walk, stroll, or wander aimlessly is a liberty within the first amendment area that is protected by the fourteenth amendment. *Papachristou v City of Jacksonville*, 405 U.S. 156, 164-5 (1972) [.] *See also, Territory of Hawaii v Anduha*, 48 F.2d 171 (9th Cir. 1931).

stand, loiter or walk upon any street or sidewalk of the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." The Supreme Court stated "Literally read, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstrations. . . [.] Instinct with its ever present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state." The Court went on to find "Our decisions make it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense. . . There must also be a showing of the accused's blocking free passage." 382 U.S. 87, 90-91 (1965).

II

The Gang Congregation Ordinance is unconstitutionally vague. The void-for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v Lawson*, 461 U.S. 352 (1983); *Hoffman Estates v Flipside*, 455 U.S. 489 (1982); *Papachristou v City of Jacksonville*, 405 U.S. 156 (1972). The test to determine vagueness is whether the statute or ordinance is so obscure that men of ordinary intelligence must guess as to its meaning and differ as to its applicability.[2] Where

[2] No person should be required at peril of life, liberty or property to guess as to the meaning of a penal statute. *Lanzetta v New Jersey*, 306 U.S. 451 (1939). "Liberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v Sharpe*, 347 U.S. 497, 499 (1954). Liberty is unconstitutionally

a statute imposes criminal penalties, as does the Gang Congregation Ordinance, the standard of certainty is higher. *Kolender v Lawson*, 461 U.S. 352, 358 n. 8 (1983). The Gang Congregation Ordinance fails both prongs of the vagueness test. The ordinance fails to notify individuals what conduct is prohibited, and it encourages arbitrary and capricious enforcement by police.

The Gang Congregation Ordinance does not advise individuals how to conform their behavior so as not to violate the law. The ordinance does not require mens rea, nor does it requires any blocking of free passage or some threat to public safety prior to one's being arrested. Statutory specificity becomes more important when scienter is not an element of the criminal offense. *Boyce Motor Lines v United States*, 342 U.S. 337, 342 (1952). It is difficult to discern on what rational basis the public can distinguish between strolling in the sunlight in Lincoln Park and meandering in Garfield Park. The ordinance's definition of loitering includes activities ranging from the ostensibly innocent to the potentially criminal. In the complete absence of statutory criteria by which the one can be objectively distinguished from the other, the ordinance is fatally flawed.

Many similar ordinances have been struck down for vagueness. In *Farber v Rochford*, 407 F. Supp. 529 (1975), the plaintiff challenged her arrest under Municipal ordinance 192-6 which provided: "It shall be unlawful for any habitual drunkard, any person known to be a narcotic addict, any person known to be a prostitute, or any person who aids or abets prostitution, or for any person previously convicted of a felony, of prostitution, or of aiding and abetting prostitution, to assemble or congregate with other persons of any [of] the foregoing classes in or upon the public ways or other public places

restricted when one has to wonder whether or not he may pursue particular conduct. *See, Aptheker v Secretary of State*, 378 U.S. 500 (1964).

in the city or to loaf or loiter in or about or frequent the premises of any place where intoxicating liquors are sold." The court held the ordinance was unconstitutionally vague because, like the Gang Congregation Ordinance, the ordinance contained no actus reus, merely conduct which while occasionally an adjunct to illicit behavior, was of itself perfectly defensible. The statute made criminal, activities which by modern standards were normally innocent. *Id.*

In *Commonwealth v Carpenter*, 91 N.E.2d 666 (MA 1950), the loitering ordinance read "No person shall, in a street, unreasonably obstruct the free passage of foot-travelers, or willfully and unreasonably saunter or loiter for more than seven minutes after being directed by a police officer to move on." The complainant was charged under the second part of this statute with willfully loitering for more than seven minutes after being directed to move on. The court held this part of the ordinance unconstitutional on its face. "It undertakes to make criminal an intentional and unreasonable failure by one on a street to move on as soon as seven minutes have elapsed after a direction to that end given by a police officer. Prima facie, mere sauntering or loitering on a public way is lawful and the right of any man, woman, or child." *Id.*, at 667. (emphasis added) The court recognized that the fatal flaw in the ordinance was its failure to notify a reasonable individual when conditions convert his lawful conduct into that which is criminal. *Id.*

In *Territory of Hawaii v Anduha*, 48 F.2d 171 (9th Cir. 1931) the court held invalid an ordinance which provided "any person who shall habitually loaf, loiter, and/or idle upon any public street or highway or in any public place shall be guilty of a misdemeanor." *Id.* Similarly in *Scott v District Attorney*, 309 F. Supp. 833 (1970), the court held unconstitutionally vague an ordinance which provided in part "The following persons are and shall be guilty of vagrancy: . . . (8) Persons found in or near any structure, movable, vessel, or private ground without being able to account for their lawful presence.["] *Id.* Each of these ordinances was found unconstitutionally vague, in part, because like the Gang Congregation Ordinance, it failed to distinguish lawful from unlawful conduct.[3]

[3] Many courts have found similar and even more specific loitering statutes unconstitutionally vague. The following ordinances were found unconstitutionally vague because they failed to adequately notify persons of the proscribed acts and/or encourage arbitrary and discriminatory enforcement. See *Bullock v City of Dallas*, 248 Ga. 164 (1981) ("No person shall remain or loiter upon any premises to which the public has access, including but not limited to such places as business and shopping area parking lots, where the person's presence upon such premises is unrelated to the normal activity, us[e] or business for which such premises are made available to the public"); *State v Starks*, 51 Wis.2d 256 (1971) ("A person found in or loitering near any structure, vehicle or private grounds who is there without the consent of the owner and is unable to account for his presence"); *Fields v City of Omaha*, 810 F.2d 830 (8th Cir. 1987) ("It shall be unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity.") *City of Bellvue v Miller*, 85 Wash.2d 539 (1975) ("Any person who wanders or prowls in a place, at a time or in a manner, and under circumstances, which manifest an unlawful purpose or which warrant alarm for the safety of persons or property in the vicinity is hereby declared to be a vagrant, and is guilty of a misdemeanor"); *City of Portland v White*, 9 Ore. App. 239 (1972) ("No person shall loiter or prowl in a place, at a time, or in a manner not usual for law abiding persons under circumstances that warrant alarm for the safety of persons or property in the vicinity"); *State of Nevada v Father Alain Richard*, 108 Nev. 626 (1992) ("Every person who: (i) Loiters, prowls or wanders upon the private property of another, without visible or lawful business with the owner or occupant thereof . . . is a vagrant."); Scott v District Attorney, 309 F. Supp. 833 (1970) ("The following persons are and shall be guilty of vagrancy: . . . (7) Persons who loaf the streets habitually or who frequent the streets habitually at late or unusual hours of the night, or who loiter around any public place of assembly, without lawful business or reason to be present; or (8) Persons found in or near any structure, movable, vessel, or private grounds without being able to account for their lawful presence therein)[.] *See also, E.L. v Florida*, 619 So.2d 252 (Fla. 1993).

Similarly, the Gang Congregation Ordinance proscribes the mere act of loitering, despite intent or effect of the loitering. The definition in the act of loitering does not encompass any criminal intent. The gang loitering statute bears a striking resemblance to that part of the ordinance the Supreme Court in *Shuttleworth* found patently unconstitutional. There is no requirement that a person block free passage, interfere with police duty, have an intent to commit a crime, or exhibit some suspicious behavior. Merely standing in a public place is a crime. A reasonable person would have no idea what was required, short of staying in his home, in order to avoid coming into confiict with this ordinance.

The gang loitering statute defines the term "loitering" as "remaining in one place with no apparent purpose."[4] The term "apparent purpose" is extremely vague and gives police complete discretion to decide who to stop. Is there a time when a person does not have a purpose for his actions? If one is standing in front of his home with a group of friends, perhaps his purpose is just to chit chat; or maybe to wait for a ride; or maybe to cool off. If a couple is sitting on a park bench, perhaps their purpose is to star gaze, or to think, or to have a quiet conversation. How many of these "purposes" although completely harmless and lawful, are apparent to one who is observing the group? The new Webster's Dictionary defines the term "apparent" as ["]seeming, but not real; real and evident, obvious". This definition illustrates the ambiguity tied to the word "apparent". Suppose a group of gang members were playing basketball in the park, while waiting for a

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[4] The term "loiter" on its face and as interpreted has no sinister meaning and implies no wrongdoing or misconduct. It is a matter of common knowledge that the majority of mankind spends a good part of their waking hours loitering and idling the time away, and much of that time is spent in public places. *See, Ricks v District of Columbia*, 414 F.2d 1097, 1103 n.46 (D.C. Cir.); *Territory of Hawaii v Anduha*, 48 F.2d 171, 172 (9th Cir. 1931).

drug delivery. Their apparent purpose is that they are in the park to play ball. The actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the 'basketball players' awaiting a drug delivery would be left alone.

There is no provision in the ordinance allowing an individual the opportunity to explain his purpose for being in a particular place, nor is it an affirmative defense that one had a legitimate purpose for being in a given place at a given time. This ordinance, like so many others found unconstitutionally vague, allows people to walk the streets only at the whim of police officers, and provides a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular unpopular groups. *Kolender v Lawson*, 461 U.S. 352 (1983).

The City cites numerous loitering ordinances to support the validity of the gang loitering statute. However, all the loitering ordinances found in the cases cited by the City contain a requisite mental state or otherwise limiting requirement not present in the Gang Congregation Ordinance.

In *colt[e]n v. Kentucky*, 407 U.S. 104 (1971), defendant was convicted under the Kentucky disorderly conduct statute, which provided: "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: . . . Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse." In upholding the statute the Court stated that because the police had a legitimate interest in enforcing traffic laws, and here [sic] the police had apprehension that defendant's behavior increased the risk of an accident, the enforcement of the ordinance was proper. Further, because the statute authorized conviction only for refusing to disperse with the intent of causing inconven-

ience, annoyance or alarm, the statute was not vague or overbroad. *Id.*

State courts have similarly required more be prohibited than mere loitering to uphold an ordinance as constitutional. In *Camarco v City of Orange*, 61 N.J. 463 (1972), the court upheld a loitering ordinance which proscribed "loitering which obstructs, molests or interferes with others lawfully in public places or which threatens an immediate breach of the peace". In upholding the ordinance, the court construed the ordinance to proscribe only "such loitering conduct as clearly will cause an immediate, actual physical violent reaction from any person, which violent reaction will cause a threat to the peace and order of the public, or loitering which obstructs the free passage of pedestrians or vehicles." The court explicitly recognized that an ordinance which simply proscribed loitering or idling without more would be unconstitutional. *Id.*, at 465.

In *State v Ecker*, 311 So.2d 104 (Fla. 1975), the court upheld a loitering ordinance modeled after the Model Penal Code which proscribed loitering in a place, at a time or in a manner not usual for law-abiding citizens under circumstances that warrant a justifiable and reasonable alarm or immediate concern for safety of persons or property in the vicinity. The ordinance defined certain circumstances which would give rise to alarm, and afforded persons an opportunity to dispel any alarm. A person could not be convicted under the ordinance if the police officer did not follow the procedures explicitly set out in the statute or if the court found his explanation for his presence would have dispelled fear. The court found the ordinance constitutional because it applied only in those situations where peace and order are threatened or where the safety of persons or property is jeopardized. In upholding this ordinance, the court explicitly recognized that if the statute merely proscribed loitering or idling without more, it would be unconstitutional. *Id.*

In *City of Akron v Holley*, 53 Ohio Misc.2d 4, 557 N.E.2d 861 (1989), the court upheld an ordinance providing "No person shall loiter in certain places in a manner and under circumstances manifesting a purpose to engage in prohibited drug-related activity contrary to the provisions of R.C. Chapter 2925." In order to uphold the ordinance, the court interpreted the ordinance to require that an illegal purpose be present in addition to mere loitering, and that this illegal purpose be manifested by some overt act. Id. at 865.[6]

All of the above cited cases have a very important commonality, not shared by the Gang Congregation Ordinance. In each instance, the loitering statute required more than mere loitering in order to bring one's conduct under the ordinance. The ordinances were either limited in scope, time, and manner, the peace and order were threatened, or the public safety was involved. In contrast, the gang loitering statute forbids members of the covered group from loitering in any public place regardless of intent or consequence.

The City argues that because the officer's [sic] must first order persons to disperse prior to arrest for violation of the Gang Congregation Ordinance, the ordinance gives sufficient notice as to what behavior is proscribed. This analysis is improper. One cannot be punished for failing to obey the command of a police officer if that command

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[6] See also, *Bell v State*, 252 Ga. 267 (1984) (The court upheld an identical ordinance to the one in *Ecker*. The court held the statute was not vague because it proscribed only loitering which amounted to a threat to the safety of persons or property in the vicinity); *Milwaukee v Nelson*, 149 Wis.2d 434 (1988) (Court upheld statute similar to the one in Bell because the ordinance was limited in scope, place and manner, and could not be violated by just loitering without more); *Tacome v Luvene*, 118 Wn.2d 826 (1992) (Court upheld statute that proscribed loitering in a manner and under circumstances manifesting the purpose to engage in drug related activity because as interpreted the ordinance required intent to engage in drug-related activity and an additional overt act besides loitering).

is itself violative of the Constitution. *Wright v Georgia*, 373 U.S. 284 (1963).

In *Wright v Georgia*, six black men playing basketball in the park were arrested for breach of the peace after failing to leave the park after being so ordered by the police. The court held that the ordinance under which the defendants were arrested was unconstitutionally vague. "The possibility of disorder by others cannot justify exclusion of the petitioners from the park." *Id.*, at 292. The fact that the defendant's [sic] were first provided with an order to leave the park, did not save the ordinance. *Id.* Similarly, the Gang Congregation Ordinance punishes conduct that cannot be constitutionally punished. A requirement that a police order to move on must first be disobeyed does not validate the ordinance.

The City argues that its General Order 92-4 read together with the Gang Congregation Ordinance renders the ordinance sufficiently clear to avoid a vagueness challenge. The court cannot agree. The general order goes to great lengths to define who is a criminal gang member. The General order does not provide any guidelines for limiting the enforcement of the ordinance to circumstances under which prohibited conduct accompanies loitering. Even with the General Order, officers are still left with unfettered discretion to decide who has an "apparent purpose" for being in a public place.

It is true that where a statute can be made constitutionally definite by a reasonable construction, the court is under a duty to give it that construction. *Orbach v Axelrod*, 100 Ill. App.3d 973 (1st Dist 1981)[.] However, to supply the necessary language to the Gang Congregation Ordinance would be to exceed the court's authority to reasonably construe the ordinance, and would result in judicial legislation. *Smith v Goguen*, 415 U.S. 566, 575. The court would have to add terms to the ordinance clearly not intended. "It would certainly be dangerous

if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Smith v Goguen*, 415 U.S. at 573.

III

The Gang Congregation Ordinance has a further fatal flaw because it looks toward the status of a person rather than his conduct. It is well settled that a person cannot constitutionally be punished for one's status. *Aptheker v Secretary of State*, 378 U.S. 500 (1964). An ordinance, such as the Gang Loitering Ordinance, which transforms into criminal behavior, ordinary conduct of individuals on the basis of suspected status or membership in a particular group, is patently unconstitutional. *Farber v Rochford*, 407 F. Supp. 529 (N.D. I.L. 1975).

In *Farber v Rochford*, discussed earlier, the court also found the ordinance in question unconstitutionally vague because it focused on covered categories of people rather than conduct as the measure of guilt. The court stated, "Statistical likelihood that a particular societal segment will engage in criminality is not permissible as an all-out substitute for proof of individual guilt. And not even past violation of the criminal law authorizes one's subjection to inately vague statutory specifications of crime.["] *Id.*, at 534, *citing Ricks v District of Columbia*, 414 F.2d 1097, 1110 (D.C. Cir. 1968).

In *Aptheker v Secretary of State*, the defendants challenged the constitutionality of the Subversive Activities Control Act which provided in relevant part: "(a) when a Communist organization is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge of notice that such organization is so registered or that such order has become final (1) to make application for a passport, or the re-

newal of a passport, to be issued or renewed by or under the authority of the United States; or (2) to use or attempt to use any such passport." The Supreme Court held the statute unconstitutional. The court found a problem with applying the statute to members of a certain group. The terms of the statute applies [sic] whether or not the member actually knew or believed he was associated with alleged communist action. "Even though some members had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct." 378 U.S. 500, 510-511 (1964). The statute improperly created an irrebuttable presumption that individuals who are members of a specified organization will engage in illegal activities. The statute applied regardless of the purpose one wished to travel, even for an innocent purpose such as to visit a sick relative. Id.; See also *Kent v Dulles*, 357 U.S. 116 (1958).

Similarly, the Gang Congregation Ordinance creates an irrebuttable presumption that a person believed to be a gang member, if standing in a public place, will commit illegal activities, and therefore, his mere presence in a public place is a crime. Under the Gang Congregation Ordinance, it does not matter whether the alleged gang member is aware of his status. In addition, anyone who wanders near an alleged gang member, whether or not that person is aware of the other's status, is subject to arrest under the ordinance.[6] As in [*Aptheker*], the gang loitering statute does not allow a person to account for his presence on the street, no matter how innocent. The

[6] The City argues that because non-gang members as well as gang members can be arrested under the ordinance, the ordinance is not status based. On the contrary, because non-gang members can be arrested because they come into contact with another whose status is suspect, whether or not they are aware of that status, does not convert the ordinance from being status based to neutral. It advocates guilt by mere association. This aspect further adds to the infirmity of the ordinance.

government cannot prevent crime by arresting those with a propensity to commit crime.[7]

The City misinterprets *Powell v Texas*, 392 U.S. 514 (1967)[,] to support the position that the Gang Congregation Ordinance is not status based. The ordinance in *Powell* made it a crime to be drunk in a public place. Under that ordinance, a drunk could be in public so long as he was sober. In contrast, the Gang Congregation Ordinance makes it a crime for a gang member to be in public whether or not he is [perpetrating] a crime. The distinction is clear, and further illustrates the invalidity of the Gang Congregation Ordinance as a status based ordinance.

In sum, the Gang Congregation Ordinance is unconstitutionally vague as it does not notify individuals how to conform their behavior to the law, and provides police with unfettered discretion in deciding who will be arrested. Further, the ordinance improperly focuses on the status of an individual as opposed to his actions. As such, the ordinance violates the Fourteenth Amendment to the United States Constitution, as well as article I, section 2, of the Illinois Constitution.

[7] *See, Ricks v District of Columbia*, 414 F.2d 1097, 1100 (D.C. Cir. 1968)[,] where court found unconstitutional an ordinance providing "The following classes of persons shall be deemed vagrants . . .: (1) Any person known to be a pickpocket, thief, burglar, confidence operator or felon, . . . and not giving a good account of himself when found loitering around in any park, highway, public building, or other public place, store, shop or reservation, or at any public gathering or assembly." In finding the ordinance unconstitutional, the court stated, "(T)he real objection to the vagrancy law is that its basic design is one of preventive conviction imposed upon those who because of their background and behavior are more likely than the general public to commit crimes, and that the statute contemplates such convictions even though no overt criminal act has been committed or can be proved . . . This issue . . . is inextricably intertwined with the vagueness question." *Id.* at 1109.

IV

The gang loitering statute is unconstitutionally overbroad. The First Amendment to the United States Constitution and article I, section 5 of the Illinois Constitution protect the rights of individuals to express themselves in a variety of ways. The First Amendment and article 1, section 5 protect the right of individuals to associate with whom they please and to assemble with others for political as well as for social purposes. *See, e.g., Buckley v Valeo,* 424 U.S. 1 (1976); *Griswold v Connecticut,* 381 U.S. 479 (1965)[.] An ordinance is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate. A statute is also overbroad when it gives enforcement officials the power to select certain citizens, from all those exercising a particular right, and punish them. *Scott v District Attorney,* 309 F. Supp. 833, 837 (E.D. La. 1970). Criminal statutes require particular scrutiny and may be facially invalid if they make unlawful a substantial amount of constitutionally protected conduct even if they also have a legitimate application. *Houston v Hill,* 482 U.S. 451, 459 (1987).

In general, an ordinance prohibiting loitering may survive [an] overbreadth challenge if it requires the specific intent to engage in an illicit act, or the observance of some action in addition to loitering. *See Colt[e]n v Kentucky,* 407 U.S. 104 (1972); *Shuttlesworth v Birmingham,* 382 U.S. 87 (1965); *Tacoma v Luvene,* 118 Wn.2d 826 (1992). The Gang Congregation Ordinance is not so limited. The Gang Congregation Ordinance not only reaches people whose conduct may threaten the community, but also reaches all forms of protected conduct as well. Under this ordinance, two friends chatting in front of one's home may be arrested; a mother may be arrested while getting a breath of fresh air in front of her home with her children, one of whom unbeknownst to her is a gang member; friends hanging out in the park enjoying the day may be arrested; a community outreach employee

who actively seeks out gang members to assist them in breaking free of the gang may be arrested. An alleged gang member cannot sit on a park bench or step outside to cool off, without the threat of arrest. Even an alleged gang member enjoys the guaranteed rights which others enjoy to loiter before shop windows, pause to enjoy the changing color of leaves and to talk with friends, so long as they are innocent of any wrongdoing.

The point is illustrate[d] well by an example proposed during oral arguments. The City was asked what would occur under the statute if an officer observed a "known" gang member in front of a 7-eleven talking with three members of the Northwest Community Federation. The hypothetical assumed that the three members of the Northwest Community Federation were trying to talk the gang member into leaving the gang. The City responded that the officer would approach the four individuals and order them to leave. If his order was disobeyed, all four would be arrested. Clearly, the purpose behind the "loitering" in this instance was positive and lawful. No criminal intent existed, no danger to the community was imminent, and nobody's path was blocked from entering or leaving the store. Nevertheless, under the Gang Congregation Ordinance, all four of these individuals are misdemeanants by virtue of expressing themselves in a way the constitution condones. See Transcript page .

It is not disputed that the city may regulate conduct which is detrimental to the public health, safety or welfare. *City of Carbondale v Brewster,* 78 Ill.2d 111 (1979). However, the purpose of the ordinance, though legitimate and substantial, cannot be pursued by means that broadly stifle personal liberties, when the end can be more narrowly achieved. *Aptheker v Secretary of State,* 378 U.S. 500 (1964); *NAACP v Button,* 371 U.S. 415 (1963). Here the City has a legitimate purpose in addressing a growing crime problem in the streets of Chicago. As such, the City may reasonably regulate conduct in an attempt to make the streets a safer place. However,

the City cannot, as it does with the Gang Congregation Ordinance, completely eliminate basic human right[s] in order to achieve its purpose. There is a less intrusive way to achieve the purpose the City desires, and that means should be pursued.

The City is mistaken in its position that the defendants' [sic] possess no right to loiter on the streets. Defendants' [sic] have such rights just as any other citizen of the United States, so long as they conduct themselves in a peaceful, orderly manner, disturb no one, and commit no overt act. *Territory of Hawaii v Anduha*, 48 F.2d 171 (9th Cir. 1931).[8]

As such, the Gang Congregation Ordinance is overbroad under the First Amendment of the United States and article 1, section 5 of the Illinois Constitution.[9]

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[8] "Personal liberty, which is guarantied to every citizen under our constitution and laws, consists of the right of locomotion—to go whe:e one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there they will be protected under the law, not only in their persons, but in their safe conduct. The constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even [sic] conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the right which our constitution guaranties. These are rights which existed long before our constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land.["] *Territory of Hawaii v Anduha*, 48 F.2d 171, 171-172 (9th Cir. 1931), *citing Pinkerton v Verberg*, 78 Mich. 573, 44 N.W. 579, 582.

[9] Defendants challenge the constitutionality of the Gang Congregation Ordinance on additional grounds including under the Fourth Amendment to the United States Constitution. Because the Court finds the ordinance unconstitutional on independent grounds the Court does not reach this issue. However, the Court does recognize

V

In light of the above, this Honorable Court finds:

1. The Gang-related Congregation[] Ordinance, City of Chicago Ordinance #8-4-015 (1992) (Gang Congregation Ordinance), violates the Fourteenth Amendment of the United States and article I, section 2 of the Illinois Constitution because its terms even as limited by General Order 92-4 of the City of Chicago Police Department, are so vague as to violate due process of law.

a. That the Gang Congregation Ordinance fails to grant sufficient notice to potential offenders of what conduct may lead to an arrest, and encourages arbitrary and discriminatory enforcement by law enforcement officials.

b. That the Gang Congregation Ordinance improperly bases arrest on an individual[']s status instead of conduct.

2. That the Gang Congregation Ordinance is overbroad on its face under the First Amendment to the United States Constitution and article 1, section 5 of the Illinois Constitution.

Accordingly, IT IS HEREBY ORDERED that the defendants' motion to dismiss is granted.

ENTERED BY:

_____

JUDGE THADDEUS L. KOWALSKI,
Associate Judge of the
Circuit Court of
Cook County, Illinois

DATED: _____

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the position of the court in *Farber v Rochford*, 407 F. Supp. 529 (N.D. I.L. 1975), *citing U.S. ex rel. Newsome v Malcolm*, 492 F.2d 1166 (2d Cir.) 1974[,] that "Because the crime prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct, they may conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause.["] *Id.* at 1172.

APPENDIX F

ORDINANCE AND REGULATION INVOLVED

Municipal Code of Chicago

Substitute Ordinance

WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and

WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and

WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and

WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and

WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and

WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and

WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and

WHEREAS, Aggressive action is necessary to preserve the City's streets and other public places so that the public may use such places without fear; and

WHEREAS, The City Council has also determined that it is necessary to amend the Municipal Code of Chicago to provide for a stronger curfew ordinance and a more effective means of enforcement; now therefore;

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION 1. Chapter 8-4 of the Municipal Code of Chicago is hereby amended by adding a new Section 8-4-015 as follows:

8-4-015. (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this Section:

(1) "Loiter" means to remain in any one place with no apparent purpose.

(2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and

whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(3) "Criminal gang activity" means the commission, attempted commission, or solicitation of the following offenses, provided that the offenses are committed by two or more persons, or by an individual at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members:

The following Sections of the Criminal Code of 1961: 9-1 (murder), 9-3.3 (drug induced homicide), 10-1 (kidnapping), 10-4 (forcible detention), subsection (a)(13) of Section 12-2 (aggravated assault—discharging firearm), 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), 12-4.6 (aggravated battery of a senior citizen), 12-6 (intimidation), 12-6.1 (compelling organization membership of persons), 12-11 (home invasion), 12-14 (aggravated criminal sexual assault), 18-1 (robbery), 18-2 (armed robbery), 19-1 (burglary), 19-3 (residential burglary), 19-5 (criminal fortification of a residence or building), 20-1 (arson), 20-1.1 (aggravated arson), 20-2 (possession of explosives or explosive or incendiary devices), subsection (a)(6), (a)(7), (a)(9) or (a)(12) of Section 24-1 (unlawful use of weapons), 24-1.1 (unlawful use or possession of weapons by felons or persons in the custody of the Department of Corrections facilities), 24-1.2 (aggravated discharge of a firearm), Subsection (d) of Section 25-1 (mob action-violence), 33-1 (bribery), 33A-2 (armed violence); Sections 5, 5.1, 7 or 9 of the Cannabis Control Act where the offense is a felony (manufacture or delivery of cannabis, cannabis trafficking, calculated criminal cannabis conspiracy and related offenses[)]; or Sections 401, 401.1, 405, 406.1, 407 or 407.1 of the Illinois Controlled Substances Act (illegal manufacture or delivery of a controlled substance, controlled substance trafficking, calculated criminal drug conspiracy and related offenses).

(4) "Pattern of criminal gang activity" means two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of this Section.

(5) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.

(e) Any person who violates this Section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months, or both.

In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to section 1-4-120 of this Code.

APPENDIX G

GENERAL ORDER

Date of Issue 7 August 1992

Effective date 8 August 1992

No. 92-4

Subject

ANTI-GANG LOITERING ORDINANCE

Distribution B

Related Directives

General Order: Processing Persons Under Department Control. Department Special Order: Processing of Juveniles. Department Notice: Ordinances, Enacted and Amended.

I. PURPOSE

This order:

A. states Department policy and provides guidelines relative to enforcement of Section 8-4-015 of the Municipal Code of Chicago to inhibit activities of criminal street gangs.

B. delineates responsibilities of Department members assigned to:

1. maintain information on criminal street gang activities and membership.

2. investigate street gang activities which may constitute violations of this ordinance.

II. POLICY

The presence of criminal street gang members in certain public and private places creates fear for the safety of persons and property in the area because of the violence, drug trafficking and vandalism associated with criminal street gang activities. In order to maintain public order, Department members will enforce all applicable statutes and ordinances in a fair and impartial manner, recognizing both the statutory and judicial limitations on police authority and the constitutional rights of all citizens. In order to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way, this directive establishes limitations on the enforcement discretion of Department members, and thereby provides for enforcement of the ordinance in a fair and principled way.

III. GENERAL INFORMATION

A. A Gang Information File will be maintained within each area unit of the Gang Crime Section and each police district for the purpose of identifying those gangs and gang members that constitute "criminal street gangs" as defined in the ordinance.

B. The Gang Arrest Information formset (CFD-45.105) will be used only to record information on persons arrested who are criminal street gang members.

C. Only sworn members of the Gang Crime Section, district tactical units and other personnel designated by an exempt member of the Department may arrest members of criminal street gangs who violate the provisions of Section 8-4-015 of the MCC.

IV. CRITERIA FOR DEFINING STREET GANGS

Criminal street gangs operating within each district must be identified. Only associations of persons meeting the definition of criminal street gangs found in Section 8-4-015 of the MCC will be designated as criminal street gangs. A criminal street gang means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of criminal gang activity, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. Criminal gang activity means the commission, attempted commission, or solicitation, in association with or with intent to promote criminal conduct by gang members, of two or more acts, at least one of which occurred after August 6, 1992, of the following offenses: murder, drug induced homicide, kidnapping, forcible detention, aggravated assault—discharging firearm, aggravated battery, heinous battery, aggravated battery with firearm, aggravated battery of a child, aggravated battery of a senior citizen, intimidation, compelling organization membership of persons, home invasion, aggravated criminal sexual assault, robbery, armed robbery, burglary, residential burglary, criminal fortification of a residence or building, arson, aggravated arson, possession of explosives or incendiary devices, unlawful use of weapons, unlawful use or possession of weapons by felons or persons in the custody of the Department of Corrections, aggravated discharge of a firearm, mob action—violence, bribery, armed violence, manufacture or delivery of cannabis, cannabis trafficking, calculated criminal cannabis conspiracy and related offenses, illegal manufacture

or delivery of a controlled substance, controlled substance trafficking, calculated criminal drug conspiracy and related offenses. Criminal street gangs will be identified on the basis of specific, documented and reliable information such as:

A. analysis of crime pattern information.

B. observations of Department members.

C. witness interviews.

D. interviews of admitted criminal street gang members.

E. information received from informants who have proven to be reliable.

V. CRITERIA FOR ESTABLISHING MEMBERSHIP IN A CRIMINAL STREET GANG

Probable cause to establish membership in a criminal street gang must be substantiated by the arresting officer's experience and knowledge of the alleged offenders and corroborated by specific, documented and reliable information, such as:

A. the individual's admission of membership.

B. the wearing of distinctive emblems, tattoos, or similar markings indicative of a specific criminal street gang, but only when such emblems, tattoos, or similar markings would not reasonably be expected to be displayed by any individual except a member of that specific criminal street gang, and membership may not be established solely because an individual is wearing clothing available for sale to the general public.

C. the use of signals or symbols distinctive of a specific criminal street gang.

D. the identification of the individual as a member of a specific criminal street gang by an individual who:

1. has provided reliable information to the Department in the past or whose information can be independently corroborated; and

2. alleges that the individual in question is a member of a specific criminal street gang.

VI. RESPONSIBILITIES

A. District commanders will:

1. after consulting with members of the Gang Crime Section, district tactical officers, and other personnel with knowledge of gang activities within the district, and consulting, as appropriate, local officials, leaders of local community organizations, and other citizens likely to be able to provide reliable information, designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community. Only areas frequented by members of criminal street gangs which, because of their location, significantly affect the activities of law-abiding persons in the surrounding community shall be designated. Examples of areas appropriate for designation include locations near schools used for criminal street gang recruiting, locations near businesses where criminal street gang activity adversely affects the patronage of those businesses, and locations at which the presence of criminal street gang members is likely to significantly and adversely affect the value of nearby property. Section 8-4-015 of the MCC will be enforced only within the designated areas.

2. utilize the following types of information in designating areas for enforcement;

a. crime pattern information;

b. citizen complaints;

c. police observations concerning the criminal activities of criminal street gangs;

d. the views of local officials, leaders of local community organizations, and other persons within the community likely to be able to provide reliable information regarding the activities of criminal street gangs.

3. coordinate enforcement efforts in cases wherein designated areas border or overlap district boundaries.

4. disseminate information regarding the specific areas within the district in which Section 8-4-015 of the MCC will be enforced to the Gang Crime Section.

5. ensure that separate Gang Information Files are maintained for juvenile and adult gang members, and contain only the names of individuals the Department has concluded that it has probable cause to believe are members of criminal street gangs operating within the district.

6. meet with the appropriate area deputy chief on a semi-annual basis to review the District Gang Information Files to ensure that:

a. information on individuals who are no longer members of criminal street gangs operating within the district is deleted from the file. Death of a member, relocation of the gang or the individual from the district, or evidence that the person has quit the gang, e.g., no arrests for a period of time, are examples of information that may indicate that the individual is no longer an active gang member.

b. the hard copies of the Gang Arrest Information formset which are removed from the Gang Information File are retained in accordance with current record retention requirements.

7. ensure that command and supervisory members instruct police officers on patrol to provide special attention to the designated enforcement areas within their patrol responsibility and ensure that members of the district tactical units are apprised of the actions of criminal street gang members loitering in these areas.

B. The Commander of the Gang Crime Section will:

1. ensure that the separate unit Gang Information Files are maintained for juvenile and adult gang members and contain only the names of individuals the Department has concluded that it has probable cause to believe are members of criminal street gangs operating within the City.

2. meet with the Chief of the Special Functions Division on a semi-annual basis to review the Gang Information Files maintained in each unit to ensure that:

a. information on individuals who are no longer members of criminal street gangs operating within the City is deleted from the file. Death of a member, relocation of an individual from the City, or evidence that the person has quit the gang, e.g., no arrests for a period of time, are examples of information that may indicate that the individual is no longer an active member.

b. the carbon copies of the Gang Arrest Information formset which are removed from the unit Gang Information Files are retained in accordance with current record retention requirements.

3. disseminate information regarding the specific areas within each district in which Section 8-4-015 will be enforced to members of the Gang Crime Section assigned to these areas.

C. Sworn members authorized to enforce the anti-gang loitering ordinance under Item III-C will:

1. familiarize themselves with information maintained by the Department concerning the members of criminal street gangs in the areas in which these members operate.

2. to the extent possible, pay attention to the designated areas within each district during the course of routine patrol activities or investigations.

3. when there is probable cause to believe that two or more persons whose names ap-

pear in a Gang Information File and those persons are active members of that criminal street gang; or

when there is probable cause to believe that criminal street gang members are loitering in a designated area

a. order such persons and any other persons loitering in the same place with such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order will be arrested and charged with a violation of Section 8-4-015 of the MCC.

b. ensure that arrestees are transported to a Department facility for processing in accordance with current Department directives.

c. complete the unshaded portion of an Arrest Report (CFD-11.420) for each adult arrested, or a Juvenile Field Arrest Report (CFD-11.421) for each juvenile arrested. The narrative section of each arrest report must adequately support the arrest by relating all essential facts and by fully describing the circumstances giving rise to probable cause to arrest. The narrative must contain articulable, specific reasons which indicate that the arrestee is in fact subject to arrest under section 8-4-015 of the MCC and include the articulable, specific reasons why the member concluded that he had probable cause to believe that the arrestee was a member of a criminal

street gang or was loitering in a group with a member of a criminal street gang.

D. The watch commander in charge of a detention facility will ensure that arrestees are processed in accordance with current Department procedures.

E. Any sworn member, who arrests a person for any criminal or quasi-criminal offense whose membership in a criminal street gang can be substantiated, will complete a Gang Arrest Information formset and submit it to his supervisor for review and signature. The hard copy of the Gang Arrest Information report formset will be forwarded to or retained in the district of occurrence; the carbon copy will be forwarded to or retained by the appropriate area unit of the Gang Crime Section.

VII. ACCESS TO FILES CONTAINING INFORMATION ON MEMBERS OF CRIMINAL STREET GANGS

District commanders and the Commander of the Gang Crime Section will ensure that access to gang information files maintained within their units is consistent with current statutes. Access will be limited to:

1. Department sworn members and representatives of other law enforcement agencies who are engaged in the investigation and suppression of criminal street gang activities.

2. any other person granted authority by statute, subpoena or court order.

/s/ Matt L. Rodriguez
Superintendent of Police